Minnesota Practice Series

Jury Instruction Guides—Civil

Minnesota
District Judges
Association

Michael K. Steenson
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Volume 4

[illegible] INSTRUCTION GUIDES

Sixth Edition

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Chapters [illegible]

Issued in [illegible] 2014

Prepared by the

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MINNESOTA PRACTICE SERIES™

Volume 4

MINNESOTA JURY INSTRUCTION GUIDES

Sixth Edition

CIVIL

[CIVJIG]

Categories 10—59

Issued in November 2014

Prepared by the

MINNESOTA DISTRICT JUDGES ASSOCIATION
COMMITTEE ON JURY INSTRUCTION GUIDES—
CIVIL

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CIVIL, SIXTH EDITION (2014)
2014

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Preface

The Minnesota Jury Instructions Guides—Civil have been published since 1963 and continuously revised and updated through the work of the Minnesota District Judges Association Civil Jury Instruction Guides Committee with valuable advice from the Minnesota State Bar Association Civil Litigation subcommittees. The Sixth Edition represents the culmination of two years of review and revision incorporating emerging areas of law.

A new category—Animal Law—Injuries Caused by Animals appears as Category 38. This section addresses the multiple theories of recovery in cases involving common law negligence, strict liability and statutory claims. Verdict forms encompassing these theories as well as cases with multiple defendants are included and can be tailored depending on the specific claims, parties and factual scenarios. The Comparative Fault Instruction found at CIVJIG 28.15 has been revised to reflect scenarios involving injury by animals.

Category 80—Professional Liability contains new instructions and special verdict forms on the "loss of a chance" theory of recovery which was adopted by the Minnesota Supreme Court in *Dickhoff v. Green*, 836 N.W.2d 321 (Minn. 2012). Under the loss of a chance theory, the reduction of a patient's chance of recovery or survival is treated as a distinct injury.

Other new instructions include instructions and special verdict forms incorporating new amendments to the Whistleblower Act, instructions on slander of title and adverse possession, revised instructions on motor vehicle conversion in initial permission cases and revised instructions for interference with prospective economic advantage.

Contract instructions, previously located in the supplement are now incorporated into the main volume and include a new instruction on anticipatory breach. Finally, Category 75—Products Liability has been revised to reflect changes in the law dealing with design defect and primary assumption of the risk.

On behalf of the entire Civil JIG Committee, I recognize, with gratitude, the superb work of the Committee's Reporters, Prof. Michael K. Steenson and Prof. Peter B. Knapp. The Reporters have steadfastly guided the Committee through many revisions and edits with their extensive knowledge of the law, patience, organization and humor. The Reporters have generously devoted hours to the Sixth Edition to provide a resource to trial judges and civil trial lawyers.

I also recognize the substantial contributions of Senior Judge Dan Kammeyer and Senior Judge John Connolly. We have all benefited from your wisdom and experience and we are grateful that you continue to do this important work.

The members of the Judge's Committee hope that you find the Sixth Edition to be a valuable and helpful resource in your Minnesota civil trial work.

KATHRYN D. MESSERICH
CHAIR
CIVIL JIG COMMITTEE
MINNESOTA DISTRICT
JUDGES' ASSOCIATION

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A. Jury Instructions: A Unique Drafting Problem. Drafting jury instructions for use in civil cases may be one of the most difficult tasks that judges and lawyers face. Several things account for that difficulty.

First, jury instructions are meant, virtually by definition, for a lay audience—jurors who, for the most part, are strangers to the substantive law and the legalistic language in which it is usually couched.

Second, finding the substantive law in the first place turns out to be a major effort with civil cases, even for those trained in the law. That is because the substantive law in civil cases is not found in one neat and tidy source. Rather, the substantive law is scattered throughout hundreds of volumes of appellate decisions, in statutes, and in the Restatement. Further, the search for a definitive statement of the substantive law is often fruitless, either because the appellate courts have never had the occasion to address the specific issue, or because the law on the issue is in a state of flux.

Third (and this is the critical reason for the difficulty in drafting jury instructions), the process of bringing the two together—the language of the substantive law, and the language of the jury instruction—requires a juggling act worthy of an Olympic event. Jury instructions must have all of these features:

- ACCURACY. An accurate statement of the substantive law, and
- UNDERSTANDABILITY: A statement of that substantive law, simple and clear enough to be understood by a lay audience of jurors, and
- COHERENCE. A coherent, well-organized, logically arranged discussion to help the jury do its fact finding.

Trying to achieve all of those desired features present a unique balancing act for the drafter of jury instructions. Oversimplifying a complex doctrine of law may result in an easily understood instruction, but at the cost of the instruction's accuracy. By the same token, reciting a provision of the substantive law—with all of its subtleties, nuances and qualifications—may insure its substantive accuracy, while making the instruction wholly unintelligible to a lay audience of jurors.

Whatever difficulties the drafting process may present, jury instructions must have all of those features (accuracy, understandability, and coherence) or they will be, essentially, worthless. See Cameron v. Evans, 241 Minn. 200, 209, 62 N.W.2d 793, 798 (1954) (instructions must be "clear and correct").

B. Civil Jury Instruction Guides It is important that we highlight the word "Guides" from the title of these volumes. That word has importance, in two different ways.

1. *Guides to the Language of Instructions.* The CIVJIG contemplates the more frequently tried cases, and provides instructions and sample verdict forms to be given in those cases. As a result, trial judges and trial lawyers often will be able—with confidence—to lift many of the instructions and verdict forms, virtually word-for-word, from the pages of the CIVJIG and use them in many trials.

But every case is different, and every trial is different. No set of jury instructions could ever hope to cover, in all its detail, every case and every trial. Hence, the word "Guides" in the title. Or, as the Explanatory Note to the Third Edition (1986) put it, in the same vein:

> Since the instructions are merely guides for the trial lawyer and judge, it is intended that they be personalized to the facts of each particular case. They may be modified or changed.

JIG, 3d ed., p. xiii (emphasis added). That certainly holds true for this edition as well.

2. *Guides to the Substantive Law.* There is another sense in which the CIVJIG's function as a "guide" should be discussed. The Committee is aware that this publication is often the first source for judges and lawyers to consult as a "guide"—not only to the language of the instructions, but to the substantive law itself. And frankly, the considerable effort to bolster the substantive law in recent editions may very well reinforce that practice.

However, reliance on the CIVJIG as a repository for the substantive law may be misplaced. Admittedly, this publication is often a good place for the practitioner to start his or her research. But, in that regard, the CIVJIG—like any other book devoted largely to practice—has its own built-in limits, especially if it becomes the exclusive source for the practitioner's research.

C. Geared to Special Verdict Practice

1. *General Verdict vs. Special Verdict.* The instructions in the CIVJIG are meant almost exclusively for use with a special verdict—as opposed to a general verdict. Those two types of verdicts can be briefly distinguished, as follows: A general verdict instantly tells the jury the effect of their fact-finding; the special verdict does not. A general verdict does not ask the jury a series of questions; the special verdict does.

2. *Impact on the Jury Instructions.* That difference between a general verdict and a special verdict is not merely one of emphasis; it is a difference in kind. And that difference carries over directly to the instructions. As a result, the language and format of the instructions in a special verdict case differ dramatically from those in a general verdict case. Instructions must match the kind of verdict form being used in the case.

With general verdict practice, the jurors decide "who wins"—and they know that. Accordingly, the instructions accompanying general verdicts must tell the jury under what conditions plaintiff wins and under what conditions he or she loses (so the jury will know which one of the two general verdicts to return).

With special verdict practice, the jury does not decide who "wins" the lawsuit. The jurors only answer some specific fact questions (without knowing the effect of their answers on the outcome of the case). Hence the instructions accompanying the special verdict form need not tell—they must not tell—the jury under what conditions plaintiff wins or loses. The instructions will "tell" the jurors only about the law they need in order to answer the fact questions on the special verdict form.

3. *Handling the "Elements of Recovery" in a Special Verdict Case.* The "elements" of plaintiff's basis for recovery (or of any de-

fenses) are handled in an entirely different way in a general verdict case than in the special verdict case. General verdict form instructions disclose to the jury the elements that need to be proven before plaintiff can recover. The recitation of those elements uses prefatory language that immediately discloses to the jury the conditions under which plaintiff can recover: "Defendant is liable to plaintiff if ...," or "For plaintiff to recover from defendant, all of the following elements must be proven. ...."

By contrast, in special verdict practice, the same elements or conditions would be stated—but never as "elements" necessary for recovery. Rather, the special verdict form itself would already have taken those elements and cast them in the form of individual questions, usually one question for each element. The special verdict instructions would then state the law applicable to that individual element/question.

4. *Special Verdict Instructions.* Because the CIVJIG is meant to provide instructions for use with a special verdict, the instructions are cast in the language of special verdict practice, as described above.

D. Organization of the Minnesota Civil Jury Instruction Guides.

1. *Classification of the Major Parts and Categories.* There are now four major parts of the instructions, each one being further divided into categories.

> Trial Process. This part contains most of the "boilerplate" instructions that will be used, probably verbatim, in every kind of civil jury trial, including categories devoted to such repeatedly used materials as "Preliminary Instructions" and "Closing Instructions."
>
> General Areas of Law. This part covers, in its categories, instructions that tend to find their way into many other more specific areas of the law. Those frequently used categories of instructions are placed into three divisions under this part: "Contract and Warranty," "Negligence," and "Vicarious Liability and Imputed Fault."
>
> Topical Areas of Law. Many judges and lawyers will probably view this part as the "heart" of the CIVJIG. For, the categories here cover many of the specific causes of action tried in Minnesota courtrooms, including: "The Civil Damage Act" (dramshop), "Defamation," "Intentional Torts" (assault and battery, etc.), "Eminent Domain," "Motor Vehicles," "Products Liability," and "Professional Malpractice."
>
> Damages. This final part is self-explanatory.

2. *Numbering the Individual Instructions.* There are over 280 individual instructions in the Sixth Edition. Each has its own title and individual number, resulting in a coherent and logical numbering of the individual instructions.

There is a further numerical pattern for the special verdict forms. Each special verdict form is placed within the ".90" series for its category. In this way, the reader-user is able to immediately identify CIVSVF 75.95 as a special verdict form (because of its ".95" suffix), within the products liability category (because of its "75." prefix). And the letter designation "SVF" further identifies the item as, indeed, being a Special Verdict Form, as opposed to the "JIG" letter designation reserved exclusively for instructions.

E. The Integrated, Cross-Referenced CIVJIG Materials. The following materials have now been fully integrated and cross-referenced:

- INTRODUCTORY NOTES
- JURY INSTRUCTION GUIDES (JIG)
- "USE NOTES" AND "AUTHORITIES"
- SPECIAL VERDICT FORMS (SVF)

Each of these matters is discussed in greater detail below.

1. *Introductory Notes.* An Introductory Note prefaces most of the categories in the CIVJIG, such as the Civil Damage Act, Defamation, Product Liability, etc. The Introductory Note gives a broad overview of the law in that particular area—usually a set of related causes of action, such as the different kinds of products liability claims—providing the following information:

- Persons able to bring suit (or not) for those claims;
- Prerequisite elements that need to be proved to sustain the claim;
- Relationships among the various claims within the category (e.g., how products liability claims based on inadequate warnings/instructions relate to products liability claims based on manufacturing flaws or design defects);
- Persons subject to liability (or not) for those claims (e.g., manufacturers, as opposed to sellers, in the products liability area);
- Defenses to claims that the law recognizes (or not) for that area of the law (e.g., "open and obvious dangers" in the products liability area);
- Damages available for claims in that area (e.g., whether damages are available for "economic loss" for products liability claims).

The Introductory Note will then move on and begin the process of "cross-referencing" and "integrating." For example (again in the Products Liability category), the Introductory Note discusses the products liability jury instructions and special verdict forms, and explains (among other things) which numbered jury instructions should be used with which special verdict forms. The Introductory Note will also make cross-references to instructions and special verdict forms in other categories. Thus, the Introductory Note for Products Liability cross-references specifically numbered instructions and special verdict forms in the Warrant category. This pattern—providing a broad initial overview of the category involved, integrating the instructions and special verdict forms within the category, cross-referencing instructions and verdict forms in other categories—is followed with most of the Introductory Notes. Accordingly, the Introductory Note is the first set of materials the trial judge and lawyer should consult when preparing for trial. It helps the reader-user get his or her bearings within the larger category of law, and directs him or her quickly to the specific jury instructions and verdict form that will likely be needed at the upcoming trial. In some cases, such as defamation and employment law, a Use Note provides a roadmap for the use of the instructions in those sections. The Use Note should be consulted first in those areas before the Introductory Note.

2. *Jury Instruction Guides (JIG).*

Absence of an Instruction. A number of topics in the CIVJIG are assigned an individually numbered designation—and yet the reader-user will find the notation "The Committee recommends no introduction." The absence of an instruction can be due to several factors. The issue involved may be a purely factual one that can only be resolved by the jury's answer to a very specific factual question on the special verdict form, without the need for any instruction. Or the state of the law on the issue is so uncertain, in the view of the Committee, that the decision whether to give an instruction—and its exact language—must be left to the discretion of the trial judge in the particular case where the issue may arise. Or it may be that no instruction should ever be given on the issue in any case whatsover, because the issue is entirely for the trial judge to decide, as a matter of law. And finally it may be that no instruction should be given because of an appellate court's articulated prohibition against giving an instruction on that issue.

For any CIVJIG-numbered designation that has no instruction, the judge and lawyers must consult the accompanying Use Note to determine the exact reason for the absence of an instruction, at the peril of committing reversible error if the instruction were to be given. In some instances, the Use Note itself will contain suggested language for an instruction, if the trial judge exercises his or her discretion and decides, indeed, to instruct on that issue.

Brackets and Parentheses. The Sixth Edition follows the practice of the Fourth and Fifth Editions (and the Minnesota Criminal Jury Instruction Guides) in its use of brackets and parentheses within the body of the instruction:

> *Parentheses* within an instruction indicate alternative facts or circumstances set out to make the instructions conform to various fact situations. One or more of the suggested alternatives set out in the parentheses must be used.

> *Bracketed* portions of an instruction set forth alternatives that may or may not be applicable, depending on the particular facts and issues involved in the case. A word or phrase in brackets need not be given, as part of the instruction, unless it is required by the facts of the case. Care must be used to determine whether the bracketed portion of an instruction applies.

3. *The "Use Note" and "Authorities" Sections.* A "Use Note" and/or "Authorities" section immediately follows each instruction. Like the broader Introductory Note that prefaces each category of law, the Use Note and Authorities sections serve a number of the same purposes—but they focus very narrowly on legal issues and practice problems (and pointers) specific to that individual instruction. So, the next sets of materials that a judge or attorney should consult immediately after the Introductory Note are the Use Note and Authorities sections for the specific individual instructions.

The now familiar pattern of cross-referencing to other instructions and to special verdict forms is continued with most Use Notes. And, Use Notes for numbered items with no instruction will tell the trial judge and counsel the exact reason for the absence of an instruction.

4. *Special Verdict Forms (SVF).* The Special Verdict Forms are the last of the integrated materials that appear within the Sixth Edition. Several categories have no corresponding special verdict forms. The reason for the lack of special verdict forms for any specific category is that most cases within that particular category can be submitted to the jury using special verdict forms from another category—usually negligence.

Most special verdict forms contain their own Use Note, which brings the pattern of cross-referencing full circle. The Use Note for a special verdict form typically correlates every question on the form with the individual instruction that should control the jury's fact finding on that question, a final piece of cross-referencing meant to "fail-safe" the use of the instructions and the special verdict form.

F. Requesting and Drafting the "Specific" Instruction

1. *The Court's "General Charge."* The entire body of the court's instructions (the court's "general charge") willl usually cover all the law the jury needs for the kind of case being tried—whether the case is a products liability case, a defamation action, an eminent domain proceeding, etc. By their submitted requests, counsel may help the court in drafting the general statement of law applicable to that kind of case.

2. *Nature of the "Specific Instruction."* Sometimes, there may be "something" in this products liability case (for example) that is not covered by the usual "general charge" in most other products liability cases. In that instance, a "specific" instruction may be

needed. "It is well established that, as against a mere general or abstract charge, a party is entitled to a specific instruction on his or her theory of the case, if there is evidence to support it and if a proper request for such an instruction is made." Hagen v. Snow, 244 Minn. 101, 106, 69 N.W.2d 100, 103 (1955).

That may be true, but the requested "specific" instruction must have the two indispensable characteristics of the instructions in the CIVJIG, before the trial judge should honor the request. In other words, the requested specific instruction must be geared to special verdict practice, and it must be in plain language.

3. *Must Fit the Program of Special Verdict Practice.* The requested instruction, even though it has all the other characteristics of a good instruction, should not be accepted by the trial judge if it does not "fit the program" of the trial. Usually (because the "program" usually is special verdict practice), that means the requested instruction must be cast in the language of a special verdict instruction. It must be an instruction that can help the jury answer one of the questions on the special verdict form, without disclosing the effect of the jury's answer to that question.

USE OF PLAIN LANGUAGE CIVIL JURY INSTRUCTION GUIDES

(Reprinted from the Fourth Edition)

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Rationale for Plain Language Jury Instructions
Changing the Way Jury Instructions Are Given
Features of Plain Language
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 b. Language and Style
  Use the Names of the Parties
  First Person Singular
  Gender
  Active Voice
  Definition of Difficult Legal Terms
  Verbatim Quotations From Statutory Language and Appellate Opinions
  Deletion of Unnecessary Legal Terms
  Limited Use of Paragraphs
  Long and Complex Sentences
  Use of Lists
  Violating Grammatical Rules
  Use of White Space
  Type Size
Judicial Discretion
For More Information

Rationale for Plain Language Jury Instructions. Judges, lawyers, and jury members have long recognized the need for jury instructions that are clear and understandable. Too often jury members are confused by highly technical language or antiquated legalese. If a jury fails to understand basic instructions, can justice be done?

In June 1995, the Minnesota Civil Litigation Section of the Minnesota State Bar Association published a committee report on civil juries. Three judges on the current civil jury instruction committee were members of that committee. Among the recommendations were that "Civil juries should be provided with written copies of all instructions," and "Jury instructions should be in plain English." The current effort to rewrite the civil jury instructions was endorsed by both bench and bar in the hope of making the Fourth Edition of the civil jury instruction guides the most easily understood.

Changing the Way Jury Instructions Are Given. Following the recommendations of the report, the new Jury Instruction Guides are intended to be both heard and read. Giving a written copy of the jury instructions to jurors follows not only Minnesota Bar recommendations but also the recommendations of the American Bar Association in 1998. Jurors will have a better chance of understanding both the general instructions on behavior and the specific instructions about a case if they have copies of the judge's instructions in writing in front of them. Research shows oral instructions by themselves are frequently ineffective. For example, research done for the military shows that poor readers, those reading at a sixth or seventh grade level, understand more if they have access both to oral and written text (Sticht, 1974). Adult education research shows that learners remember just 5% of lecture material. This figure leaps to 50% when material is presented in alternative formats. The more juries read, the more they learn. Reading and hearing information at the same time is a more effective way of presenting information.

Designing instructions that are intended to be both heard and read has its pitfalls. Plain language in a written form is logical and easy to understand. Read aloud, however, it can sound short and disjointed. A judge may ask, "What is the proper way to read a list?" Is the tone and style "unfriendly" in sound? Conversely, speakers who take part in round table discussions or give informal talks are often horrified at seeing a written transcript of their presentation. What sounded logical, appropriate, and perhaps impressive when said aloud looks less impressive when it is written verbatim. These instructions keep both oral and written versions in mind. Many judges on the committee were reluctant to give up rhetorical style and eloquent expressions they used orally for the more blunt plain language usage. Accommodating both written and oral language led to a number of adaptations, especially in the use of subheads.

Features of Plain Language. Plain language uses a number of criteria encompassing (a) organization of information, (b) language and style, and (c) design and format that are unique to written information.

a. *Organization of Information.* Subheads are used in the written but not the oral form. The use of subheads is critical in organizing written information. The reader can scan a set of instructions and find information immediately. The subhead informs the reader what the paragraph is about and allows the reader to grasp the gist of the information. The use of subheads also forces the writer to organize his or her material so that only one basic idea or concept is included in each paragraph.

Subheads are strongly endorsed by the authors of Jury Trial Innovations, a publication developed by the National Center for the State Courts under a grant by the State Justice Institute in 1997. All of the research on plain language identifies subheads as critical in helping the reader understand written material.

Subheads are obviously unnecessary in oral presentations. A more conversational "Now I will tell you about taking notes," serves a similar function to subheads in alerting the jury to what they are about to hear.

b. *Language and Style.*

Use the Names of the Parties. The ABA and others recommend using case-specific terms, such as "Ms. Smith" or "Speedy Transportation," rather than the generic "plaintiff" and "defendant." The Third Edition used both methods somewhat randomly. The Fourth Edition uses (plaintiff) and (defendant), with the intention that the names of the parties will be used. Lawyers and judges would never confuse the meanings of "plaintiff" and "defendant," or even "lessor" and "lessee." However, the uninitiated jurors are more than likely to do so.

First Person Singular. "I" and "you" are frequently used in the judge's instructions when addressing the jury. We deleted references to the vague amorphous entity "the court," changing "The court has decided Mr. Smith was not at fault" to "I have decided Mr. Smith was not at fault."

Gender. In terms of gender reference, we have used a "(he) (she)" format when referring to a specific person, as in "the advice John Smith would have given had he lived." "He or she" is used in the general, "a person must take reasonable care when he or she drives a car."

Active Voice. Legal writing has traditionally used the passive voice. For example, "The law requries that fault be apportioned among those parties found to be at fault . . . ." was rewritten as follows: "You must decide the degree to which each person is at fault." The move from passive to active voice has been almost universally adopted from academia to the insurance industry.

Definition of Difficult Legal Terms. Plain language rules are quite specific in their instructions on legal terms. If it is legally necessary to include a specific term, then that term has to be defined. This requirement has been a contentious issue. Where a word of art in law may have a very specific meaning, the explanation may alter that meaning in ways that are not immediately apparent. What is a good definition of "superseding cause" or a "warranty of merchantability"? On the other hand, the word "chattel," although only used in the title of the instruction, was easily replaced by "property"; no one on the CIVJIG Committee could find a chattel that was not owned (at least at one time). Similarly, "speech or other conduct" can be more adequately described as what a person "did or said," as in the new language on implied warranty. Throughout, we have tried to find accurate and unambiguous explanations, while keeping the term of art in place when necessary.

Verbatim Quotations From Statutory Language and Appellate Opinions. A second difficult issue concerns the use of statutory language or language taken from appellate decisions. Some judges and lawyers feel that they must use the exact words and terms used in a law, because that is literally the law. What the legislators or judges might have actually meant, or thought they meant, has nothing to do with it. Indeed, there is safety in using the exact words of a law or higher court opinion. Judges and lawyers continue this practice despite the fact that much of the language is incomprehensible to the general public, many lawyers, and even some judges.

Take the area of products liability, where a jury is asked to decide if a manufacturer is responsible for selling a dangerous product. The established language reads "a product is in a defective condition unreasonably dangerous to the (user) if the (manufacturer) knew or reasonably could have discovered the danger involved in the use of the product." That sounds quite reasonable to the expert ear. But a lay person might ask, "Is the product dangerous because it is defective?" "Is it defective because it is dangerous?" "What is reasonably dangerous?" This was a problem we did not solve, and the language remains intact.

Similarly, the definition of "reckless conduct," when taken verbatim from the Third Edition definition, reads: "Conduct is reckless if the person who engages in that conduct knows or has reason to know of facts that create a high degree of risk of harm to another, and proceeds to act, or fails to act, in deliberate disregard of, or indifference to, that risk (or, if the person does not actually realize or appreciate the degree of risk, acts or fails to act under circumstances where a reasonable person in the defendant's position would have realized or appreciated the degree of risk)." Faced with this tangle of prose, the reasonable person falls back on his or her common sense understanding of recklessness.

One final example from government bolsters this point of view that statutory language does not need to be quoted verbatim. OSHA regulations are designed to convey information to workers about hazardous chemicals in the workplace. The OSHA regulations are a prime example of convoluted bureaucratic language. However, some lawyers insist that workers get these instructions in the original, rather than plain language versions, because OSHA's words are OSHA's words. This view is misguided, in that OSHA is telling us the categories of information that must be shared, but does not necessarily mandate any particular word usage. Is it more important that workers actually know about the hazards, or that they have been "informed"? This interpretation on the actual wording has been confirmed by conversations with OSHA staff in Washington, D.C.

Deletion of Unnecessary Legal Terms. Legal authorities such as Wydick and Martineau caution against the use of redundant language. Examples are word pairs such as "usual and customary" and "full and complete." The old version of the instructions and legal writing in general is full of redundancy. We were able to eliminate some, but not all of it. A doctor must both have and use skill and knowledge. Can he or she use knowledge if he or she does not have it? Take a look at the definition of "reckless" given above if you need further proof of redundancy.

Limited Use of Paragraphs. Most readers are used to a style of prose writing that makes extensive use of paragraphs. Plain language style mandates short paragraphs, each containing only one major topic. The most common way to deal with overly long paragraphs is to limit the average number of words per paragraph. The Connecticut Plain Language Act limits paragraphs to an average of 75 words; Minnesota's Plain Language Contracts Act is more stringent with a 60-word average. However, we were not concerned with arbitrary word limits. Our main concern was clarity and the separation of ideas into understandable elements.

Different rules apply to procedural and narrative text. Since we were dealing with a set of instructions that are essentially procedural and not narrative, we followed accepted rules for procedural text. We put each instruction on a new line. Frequently, this meant abandoning paragraphs altogether. Many procedural documents are devoid of paragraphs and use bullets to give visual emphasis to each instruction. To judges and lawyers who are used to elegant linkages between sentences that draw concepts together in paragraphs, this approach is disconcerting. For the layperson, separating out elements is crucial to understanding unfamiliar ideas.

Long and Complex Sentences. The previous instructions had a knack of adding modifying clauses to sentences until they became almost incomprehensible. Take the following sentence from the old version of JIG 310: "A passenger has a duty to take active measures to protect (himself) (herself) from danger only when it is apparent that (he) (she) can no longer rely upon the driver for protection, [as when the driver by his conduct shows the (he) (she) is incompetent to drive or where the driver is unmindful of or does not know of a danger known to the passenger] and then only if the passenger becomes aware of the danger at a time and under circumstances where (he) (she) could have prevented the harm." This 91-word sentence violates every known rule of plain language and can easily be broken down into shorter sentences or by the use of lists as below into a shorter version that now reads:

A passenger must act to protect himself or herself when:
a. It is apparent that the driver cannot do so, and

b. The passenger's action could have prevented the harm.

Use of Lists. Lists are not used in oral language, but are a common feature of plain language. They organize and simplify. This is especially the case where there is an extensive set of factors to take into consideration, as when awarding damages. Lists can also clearly identify a set of factors needed to establish a legal concept, such as fraud. The new CIVJIG instructions also use lists within sentences.

We have used a colon to introduce a vertical list. Following accepted style manuals, we tend not to separate listed items with punctuation, and the first letter of each item is usually capitalized. The disk version may allow all sorts of interesting word processing options for the lists, such as (accident) (collision) (event) (etc.), to be handled with a little more ease.

Violating Grammatical Rules. Plain language does not follow every grammatical rule, no matter what. Not that we advocate breaking grammatical rules; we do not. However, there are some rules that are generally regarded as outdated. For example, it is now perfectly acceptable to start a sentence with "and," "but," "or," and "so." In addition, you may split infinitives, although strict grammarians might turn in their graves. Sentences may be ended with a preposition. These examples taken from the guidebook of the plain English campaign serve to illustrate how the English language is constantly evolving and changing. Plain language emphasizes meaning over rules and clarity over elegance.

c. *Format and Design.* Legal writers have often overlooked format. However, the following items are crucial:

Use of White Space. Adequate space between lines, sentences, and paragraphs makes instructions easier to read.

Type Size. Again, although dismissed as trivial, in one of the few plain language cases that has been decided, New York vs. Lincoln Savings Bank [No. 41526–80 (Sup. Ct. of the State and County of New York, June 1980)], type size was critical. A safety deposit box agreement was found to be in violation of the New York Plain Language Contract Law, based entirely on type size and lack of white space. There has been a tendency for judges in more recent cases to focus on format and legibility.

Judicial Discretion. Judges have always customized their instructions to fit their own style and the case they are dealing with. Nothing in this Fourth Edition is intended to change this. The availability of a disk version will make customization easier. We hope these instructions, both in terms of substance and style, will make the task of writing jury instructions easier.

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CIVJIG 10.15

PRELIMINARY INSTRUCTIONS—BEFORE TRIAL

Introduction

Members of the jury:

You have now been sworn in.

Of all the people in this courtroom, it is vital that you the jury be able to hear and see everything. If any of you have difficulty hearing or understanding what a witness is saying, or if a witness or an attorney should block your view, raise your hand immediately so that we can correct that.

Duties of the jury and the judge

Here are some basic rules about your job as a juror.

Your job will be to find what the facts are in this case by considering the evidence.

As judge I will apply the rules and tell you what you can and cannot consider as evidence.

What is evidence

1. Evidence is what witnesses say on the stand. This is called "testimony."
2. Evidence can be items like photographs and documents. These items are called exhibits.
3. There are also facts you must accept:
    a. Evidence can be a fact agreed upon by the parties. This agreement is called a stipulation.

    b. There may also be facts that I tell you to accept.

What is not evidence

The following are not evidence:

1. Nothing the attorneys say during the trial, including opening statements and closing arguments, is evidence.
2. The attorneys' questions are not evidence. The witnesses' answers are.
3. Objections are not evidence. Attorneys may object if they think a question or answer is against the rules:
    a. I will sustain the objection if I think it is against the rules, and you should ignore this question or answer.

    b. If I overrule the objection, the answer is evidence like the rest of the witness's testimony.
4. You cannot consider anything you hear or learn about this case outside this courtroom.

You must follow the instructions on what you can consider as evidence.

Taking notes

You may take notes during the trial. You do not have to.

Do not let your note taking distract you.

Your notes must stay in the courtroom during the trial.

You may take them into the jury room during deliberations.

Use your notes as an aid to your memory. Fit them in with your total recollection of the facts.

A written note does not necessarily make a piece of evidence more important, whether you or another juror wrote it down.

Deciding the facts

Wait until you have heard all the evidence before you make up your mind.

Your best guide is your own good judgment, experience and common sense.

In addition ask yourself:

1. Is a witness being truthful?
2. Will a witness gain or lose if this case is decided a certain way?
3. How did a witness learn the facts? How did he or she remember and tell the facts?
4. What was his or her manner?
5. What was his or her age and experience?
6. Did the witness seem honest and sincere?
7. Was the witness frank and direct?

8. Is the testimony reasonable compared with other evidence?

9. Are there any other factors that bear on believability and weight?

Duty of the jury

You must decide the facts.

You and only you can decide the facts. Do not take anything I say or do as a sign of what the verdict should be.

You must apply the law to the facts.

You must follow the law I give you even if you don't agree with it.

How to act as a jury member

Now a few words about your conduct as jurors:

Do not let outsiders influence you.

Do not discuss this case with other jury members during the trial.

You will have plenty of time to do this at the end of the trial, once you have all the evidence.

If anyone tries to discuss this case with you outside the courtroom, report this to me.

Do not do your own investigation. Do not ask people about this case. Do not refer to any newspapers, books, magazines, the internet, or other sources of information to answer questions of fact or of law raised by the evidence or by the court's instructions.

When you go home during the trial, do not talk to your family, friends, or others about the case. You may tell them you are a juror on a civil case and that is all that you should tell them. Do not report your experiences as a juror while the trial and deliberations are going on. Do not e-mail, blog, tweet, text or post anything to Facebook, MySpace, or other social networking sites about this trial. Do not visit any "chat rooms" where this case may be discussed.

Keep an open mind until you have heard or seen all of the evidence.

Remember you cannot consider anything you hear or learn about this case outside this courtroom.

These rules are important. If these rules are not complied with, the whole trial may need to be redone and we will have to start over from the beginning.

Interpreters

[[Name of language] may be used during this trial.]

[The state policy is to use [interpreters] [translators] where it is the judgment of the court that it is necessary to ensure fairness in a trial.]

[The [interpreter] [translator] is instructed to interpret everything that is said.]

[The decision to use [an interpreter] [a translator] is my decision.]

[The use of [an interpreter] [translator] may make the case take longer than it would without [an interpreter] [translator]. You should not hold this against any party.]

[The evidence you are to consider is only that provided through the official court [interpreters] [translators]. Although some of you may know [name of language used], it is important that all jurors consider the same evidence. Therefore, you must accept the English [interpretation] [translation]. You must disregard any different meaning.]

AUTHORITIES

This instruction is based on the Minnesota Civil Trialbook § 7. It is consistent with the recommendations made by the Minnesota Jury Task Force. The portions of the instruction concerning jurors' use of notes is based on CRIMJIG 3.09.

The considerations set out in the section of the instruction concerning interpreters are based on recommendations of the Implementation Committee on Multicultural Diversity and Racial Fairness in the Courts. The final paragraph is based on the Ninth Circuit Manual of Model Jury Instructions—Criminal § 1.13 (2000 ed.).

USE NOTE

The instruction may be made more detailed so as to include references to other specific factors relevant to determine witness credibility, or the standards applicable to evaluating expert testimony. The instruction should also be modified in cases where one or more parties are appearing *pro se*. If a party is appearing *pro se*, the trial judge should instruct the jury that when the *pro se* litigant is questioning witnesses, what the litigant says is not evidence.

Trial judges should use their own discretion and experience to formulate more detailed instructions on the use of notes. Some judges instruct jurors to place their notes on their chairs when they leave the courtroom, and then have the law clerk collect the notes for safekeeping until the jurors return. Other judges permit jurors to take notes home with them in the evening, and instruct jurors not to show their notes to others during the course of trial.

All or part of the last section of the instruction may be given in cases where translators or interpreters are used. The purpose of this section of the instruction is to ensure that the jury understands the reason for using an interpreter or translator, that the decision to use an interpreter or translator is the court's decision, that the jury should not view any party adversely for needing an interpreter or translator, and that the jury should accept only the official translation as evidence. The instruction may be given as part of CIVJIG 10.15, which covers preliminary instructions before trial, and also as part of CIVJIG 10.20, which covers post-trial instructions. Cautionary language concerning e-mail, websites, and social networks has been added to this instruction.

CIVJIG 10.20

POST-TRIAL PRELIMINARY STATEMENT—DUTIES OF JUDGE AND JURY

Instructions

I will give you your instructions.

The order in which I give the instructions is not important.

Consider all the instructions together.

You must apply the law in these instructions whether you agree with it or not.

You must follow all of the instructions. Do not single out some and ignore others—all of them are equally important.

I will give you a copy of these instructions to take into the jury room. You do not need to take notes as I read the instructions to you.

Duties of the jury and the judge

You must decide what the facts are from the evidence you have heard and seen. You must apply the law to these facts. I will explain which laws apply.

The questions you have to decide are listed on the verdict form. I will order a judgment based on your answers to the questions and the law.

It is your exclusive duty to answer the questions on the verdict form. Do not take anything I do or say as a sign of what the answers should be.

Deciding the facts

Decide the case on the evidence.

Base your decision only on the evidence you have seen or heard in this courtroom.

You must not let events outside the courtroom influence you.

Impartiality

You cannot take sides based on personal likes, dislikes or prejudices.

You must not be concerned that a particular answer on the verdict form is favorable to one party or the other.

USE NOTE

Instruction on Particular Theories. A trial judge has broad discretion in determining jury instructions. *Hilligoss v. Cargill, Inc.*, 649 N.W.2d 142, 147 (Minn. 2002); and, *State Farm Fire & Cas. Co. v. Short*, 459 N.W.2d 111, 113 (Minn. 1990). A party is entitled to an instruction setting forth his or her theory of the case if there is evidence to support it, and if it is in accordance with applicable law. *Poppenhagen v. Sornsin Constr. Co.*, 300 Minn. 73, 81, 220 N.W.2d 281, 286 (1974); *Bermel v. Auge*, 574 N.W.2d 460, 462 (Minn. Ct. App. 1998). However, a special requested instruction setting forth a litigant's theory of a case may be denied if the substance of it is adequately covered by the charge as a whole. *Poppenhagen*, 220 N.W.2d at 286, *quoting Hammond v. Minneapolis St. Ry. Co.*, 257 Minn. 330, 333, 101 N.W.2d 441, 443 (1960).

Site Views. The trial judge may, in his or her discretion, permit a jury to view the site of an accident or view other real property that is the subject of litigation. M.S.A. § 546.12 sets forth some guidelines for a jury's site visit:

> In a civil case when the court deems it proper that the jury should view real property which is the subject of litigation, or the place where a material fact occurred, it may order them to be taken, in a body and in the custody of proper officers, to the place, which shall be shown to them by the judge, or by a person appointed by the court for that purpose; and while the jurors are thus absent, no one other than the judge or person so appointed shall speak to them on any subject connected with the trial.

The purpose of the view is not, however, for the jury to collect evidence. Rather, the purpose of the site visit is to enable the finder of fact to understand and apply the evidence given in court. *Huyink v. Hart Publications, Inc.*, 212 Minn. 87, 91–92, 2 N.W.2d 552, 554 (1942). So long as it is clear that the finder of fact did not gather evidence, the fact finder's decision will not be reversed. *Scroggins v. Solchaga*, 552 N.W.2d 248, 252 (Minn. Ct. App. 1996) (concerning a trial judge's inspection of real property). The trial judge should take care to instruct jurors that they should not make an unauthorized viewing of a site. Not every unauthorized view will result in a new trial, however. *See City of Bloomington v. Vinge*, 284 Minn. 202, 206, 169 N.W.2d 752, 754 (1969).

CIVJIG 52.25, View of Premises—Evidence of View, is the appropriate instruction to use in eminent domain cases in which jurors have viewed the property.

The final two sentences of this section of the instruction have been added to clarify that jurors will have access to a copy of the instructions during deliberation and, consequently, do not need to take notes during the charge.

AUTHORITIES

Fact questions are to be decided by the jury if the evidence is conflicting, or if conflicting inferences may be drawn from the evidence. Minn.R.Civ.P. 50.01. *See Lakehead Constructors v. Roger Sheehy Co.*, 304 Minn. 175, 178, 229 N.W.2d 514, 515–16 (1975) ("The standard to be used in determining whether a verdict should be directed by the trial court, while often worded in different ways, is essentially whether different persons could reasonably come to different conclusions after viewing the evidence as a whole in the light most favorable to the nonmoving party.").

The jury must follow and apply the law as given by the trial judge. Failure to do so results in a perverse verdict that cannot be accepted. *See Willett v. Seerup*, 151 Minn. 105, 106–07, 186 N.W. 225, 226 (1922).

Research References

West's Key Number Digest
Trial ⚷186, 196, 208, 213, 217

Legal Encyclopedias
C.J.S., Trial §§ 491, 497, 548, 552 to 553, 569

CIVJIG 10.25

STATEMENTS OF COUNSEL AND JUDGE

Duties of the attorneys

The attorneys have professional duties:

1. They represent their clients.
2. They introduce evidence to support or defend their clients.
3. They make objections.
4. They argue their clients' cases.

Statements of the attorneys and judge

Nothing the attorneys say during the trial, including opening statement and closing argument, is evidence.

The attorneys' questions are not evidence. The witnesses' answers are evidence.

What I say or what the attorneys say about the evidence may be different from what you remember. If that happens, rely on your own memory.

What the attorneys say about the law may be different from what I say. If this happens, you must rely on what I say about the law.

USE NOTE

The instruction should be modified in cases where one or more parties are appearing *pro se*. If a party is appearing *pro se*, the trial judge should instruct the jury that when the *pro se* litigant is questioning witnesses, what the litigant says is not evidence. For example, the following instruction could be read after the second paragraph of the second section of the instruction, Statements of the attorneys and judge:

In this case, [name of party] has chosen to act as (his)(her) own attorney. When I refer to attorneys, this includes [name of party] when (he)(she) is acting as (his)(her) own attorney. For example, this means that [name of party's] questions are not evidence. [Name of party's] sworn testimony is evidence.

AUTHORITIES

During final argument, counsel has a right to make all legitimate arguments, analyze and explain the evidence, and present all proper inferences, and the trial judge should not infringe on the right. *See Pearson v. Northland Transp. Co.*, 184 Minn. 560, 566, 239 N.W. 602, 605 (1931). While counsel are entitled wide latitude in their final arguments to the jury, such latitude is not without limitations. *Malik v. Johnson*, 300 Minn. 252, 219 N.W.2d 631 (Minn. 1974). A trial court has the primary responsibility to determine the line between legitimate advocacy and unfair overreaching. *Eklund v. Lund*, 301 Minn. 359, 362, 222 N.W.2d 348, 350–51 (Minn. 1974). Any objection to opening statement or final argument can be made either during the statement or argument or at the close of the statement or argument. Any objection shall be argued outside the jury's hearing. Minn.Civ.Trialbook § 8(b).

Final arguments shall not misstate the evidence. Minn.Civ. Trialbook § 8(b). *See also Parkside Mobile Estates v. Lee*, 270 N.W.2d 758, 763 (Minn. 1978). Ultimately, the jurors are the exclusive judges of the facts, and their recollection prevails. *Hardy v. Anderson*, 241 Minn. 478, 483, 63 N.W.2d 814, 818 (1954). If the court is uncertain whether there has been a misstatement of the evidence in final argument, the court should instruct the jurors to rely on their own recollections. Minn.Civ.Trialbook § 8(c). Except in extreme cases, counsel's misstatements or errors in arguing the law or facts of a case are cured when jurors are expressly instructed that they are the exclusive judges of facts; that their recollection of facts must prevail over any contrary contentions of counsel; and that they must take and apply the law as given by the court and not as presented by counsel. *Kramer v. Kramer*, 282 Minn. 58, 70, 162 N.W.2d 708, 716 (1968).

Research References

West's Key Number Digest
Trial ⚷185, 186, 204, 218

Legal Encyclopedias
C.J.S., Trial §§ 490 to 491, 554, 562

CIVJIG 10.30

RULINGS ON OBJECTIONS TO EVIDENCE

Rulings on evidence

The law has rules about the evidence allowed in a case. It is my duty to make sure the rules are followed.

Objections

Attorneys objected if they thought a question or answer was against the rules. Keep the following in mind about objections:

1. If I sustained the objection, ignore that question or answer.
2. If I overruled the objection, that answer is evidence like anything else.
3. Remember that objections by themselves are not evidence.
4. The fact that evidence has been objected to should not affect your view of the evidence.

Evidence that is not allowed

I have told you when other types of evidence are against the rules and have to be ignored or stricken from the record.

USE NOTE

If a party is appearing *pro se*, the trial judge should instruct the jury that when the *pro se* litigant is making objections, what the litigant says is not evidence.

AUTHORITIES

Admissibility of evidence is determined by the judge. Minn.R.Evid., Rule 104(a) provides as follows:

> Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making his determination, he is not bound by the rules of evidence except those with respect to privileges.

Research References

West's Key Number Digest
Trial ⚷207, 208

Legal Encyclopedias
C.J.S., Trial §§ 489, 567, 569

CIVJIG 10.35

NOTES TAKEN BY JURORS

How to use notes

If you took notes during the trial, you may take them to the jury room.

Use the notes as an aid to your memory and not as a substitute for it.

A written note does not necessarily make a piece of evidence more important, whether you or another juror wrote it down.

AUTHORITIES

This instruction is based in part on CRIMJIG 3.09.

Research References

West's Key Number Digest
Trial ⚿206, 217, 307(1)

Legal Encyclopedias
C.J.S., Trial §§ 552 to 553, 566, 803 to 806

CIVJIG 10.40

SEPARATION OF JURY RECESS OF JURY

Recess of jury

This jury will be adjourned until (time and date). You may return home.

While you are adjourned, there are some rules you must follow:

1. You must not discuss this case with anyone.
2. You must not let anyone discuss the case with you.
3. You must not do any investigation yourself or ask others to do it for you.
4. You must not refer to any newspapers, books, magazines, the internet, or other sources of information to answer questions of fact or of law raised by the evidence or by the court's instructions.
5. You must not e-mail, blog, tweet, text or post anything to Facebook, MySpace, or other social networking sites about this trial. Do not visit any "chat rooms" in order to discuss this case.

These rules are important. If these rules are not complied with, the whole trial may need to be redone and we will have to start over from the beginning.

You are excused until (time and date). You will come back to the jury box before returning to your deliberations.

USE NOTE

Casual observations of a juror during such separation concerning matters in issue at the trial that are made incident to the juror's ordinary affairs do not constitute misconduct. *Olberg v. Minneapolis Gas Co.*, 291 Minn. 334, 341, 191 N.W.2d 418, 423 (1971).

Cautionary language concerning e-mail, websites, and social networks has been added to this instruction.

AUTHORITIES

Minn.R.Civ.P. 47.03 permits the trial judge to allow the jury to separate overnight and return to its deliberations the following morning.

CIVJIG 10.45

DELIBERATION AND RETURN OF VERDICT

Deliberation and Return of Verdict

Here are some instructions about your deliberations and return of the verdict.

Items that will be in the jury room

During your deliberations you will have the following items in the jury room:

1. Any exhibits received in evidence,
2. The notes you took during the trial,
3. The written final instructions, and
4. The verdict form.

Selection of a foreperson

When you return to the jury room to discuss this case, you must select a jury member to be foreperson. That person will lead your deliberations.

The jurors' duty to discuss the case

The goal of jury deliberations is to talk among yourselves in order to reach an agreement about the verdict.

This agreement must be consistent with your own judgment.

Each of you must decide the case for yourself, but do so only after you have fully considered the views of your fellow jurors.

Re-examine your own view and change your mind, if you decide your original view was mistaken.

But do not change your mind just because other jurors disagree, or simply because of pressure to return a verdict.

Kinds of verdict

There are two kinds of verdicts: a unanimous verdict and a divided verdict.

Unanimous verdict

Your verdict must be unanimous, that is: all jurors must agree on all the answers.

The foreperson must date and sign the verdict form if your verdict is unanimous.

Divided verdict

If you cannot reach a unanimous verdict after six hours of deliberation, then [five] [other number] of you may return a divided verdict.

If you return a divided verdict, each of the [five] [other number] jurors must sign and date the jury form.

The same [five] [other number] jurors must agree on all answers.

Return of the verdict

When you agree on a verdict, notify the (bailiff) (jury attendant).

You will return to the courtroom where your verdict will be received and read out loud in your presence.

[Sealed verdict

If you agree on a verdict when the court is in recess:

1. Put your completed verdict in the envelope and seal it.

2. Give the sealed envelope to ____.
3. You may leave the courthouse.
4. You must return to the court at ____, when I will receive your verdict in open court. The verdict will be read out loud in your presence.
5. Do not discuss the case with anyone or let anyone know your verdict, until it is read in court.]

Secrecy of the jury deliberations

Your deliberations must be secret and confidential.

You must not communicate with anyone except other jury members about the case during your deliberations.

During your deliberations, you may have questions about things unrelated to the case itself (such as supplies or the physical facilities). If so, ask the (bailiff) (jury attendant).

Juror's responsibility

You must not allow sympathy, prejudice, or emotion to influence your verdict.

The quality of your service will be reflected in the verdict you return to this court.

A just and proper verdict contributes to the administration of justice.

USE NOTE

Divided or Five-Sixths Verdict. *See also* Minn.R.Civ.P. 48, Number of Jurors; Participation in Verdict, and the Advisory Comments thereto. As those Advisory Comments note:

> . . . Where jury of more than six, but fewer than twelve, jurors deliberates, a 6/7ths, 7/8ths, 8/9ths, 9/10ths or 10/11ths verdict is permitted. For a twelve-person jury, ten of the twelve jurors (the equivalent of 5/6ths) can return a verdict.

Timing of Instruction. This instruction should be given as part of the general charge. If given as a part of the regular charge, it may be repeated if the jury deadlocks.

Length of Deliberations. Jurors are assumed to be deliberating during the hours they are in the jury room. *See In re Estate of Healy*, 243 Minn. 383, 388–89, 68 N.W.2d 401, 404 (1955); *In re Hurlbut's Estate*, 126 Minn. 180, 183–84, 148 N.W. 51, 52–53 (1914); *see also Beasy v. Misko*, 297 Minn. 527, 528–29, 211 N.W.2d 881, 882–83 (1973). If the trial judge believes that deliberations have not consumed six hours, even though the jury has been out that amount of time, the judge may refuse to accept the five-sixths verdict. *See In re Hurlbut's Estate*, 126 Minn. 180, 184, 148 N.W. 51, 53 (1914).

Illness or Absence of a Juror. Unless the parties consent, it is error for the trial judge to accept a five-sixths verdict where one of the jurors becomes ill and is removed as a juror before return of the verdict. *See Johnson v. Holzemer*, 263 Minn. 227, 236, 116 N.W.2d 673, 678 (1962). Minn.R.Civ.P. 48 provides that "Unless otherwise provided by law or the parties otherwise stipulate, (1) the verdict shall be unanimous and (2) no verdict shall be taken from a jury reduced in size to fewer than six members."

Use With Special Verdicts. Minnesota's statute does not specify that the same five jurors must agree on the answers to all of the special verdict questions. M.S.A. § 546.17. The Minnesota Supreme Court's decision in *Ferguson v. Northern States Power Co.*, 307 Minn. 26, 36–37, 239 N.W.2d 190, 196 (1976), however, requires that the same five jurors must concur on the fault, causation, and apportionment questions. In *Ferguson*, the supreme court stated that the absence of a specific provision in M.S.A. § 546.17, requiring that the same five-sixths of the jurors must agree on all special verdict questions, does not preclude imposition of such a requirement. A different five-sixths may apparently agree on the damages question.

In that same case, the court also held that, in the event of a five-sixths verdict, those jurors who dissent from a finding of causal negligence on the part of one or more of the parties are disqualified from participating in the apportionment of causal negligence. *Ferguson*, 307 Minn. at 37, 239 N.W.2d at 196.

Signing of the Verdict Form. M.S.A. § 546.18 provides, that when less than the full number of jurors agree on the verdict, "the same shall be signed by all the jurors who concur therein, and the court administrator shall enter on the minutes the number of jurors concurring in the verdict."

Negligence Cases. In *Ferguson v. Northern States Power Co.*, 307 Minn. 26, 239 N.W.2d 190 (1976), plaintiff sued a utility company for injuries his son suffered as a result of contact with a power line. The jury reached a unanimous decision that plaintiff and his son were causally negligent, but only 10 of the 12 jurors found defendant causally negligent. All 12 jurors reached agreement on the comparative negligence question, apportioning 70% of the fault to plaintiff, and 30% to defendant.

The supreme court reversed and remanded for a new trial, holding that:

> . . . the jury should be instructed, in the event of a five-sixths verdict, that those jurors who dissent from a finding of causal negligence on the part of one or more of the parties are disqualified from participating in the apportionment of causal negligence.

Ferguson, 307 Minn. at 37, 239 N.W.2d at 196. The court relied on Wisconsin case law and statutory authority for its decision. While recognizing that Wis. Stat. § 270.25(1) expressly provided for this result, the court reasoned that "the absence of that provision in our statute . . . does not necessarily mandate a different result." The court was concerned that participation by the two dissenting jurors in the apportionment of negligence would be prejudicial to plaintiff. "The questions regarding the causal negligence of the parties and the apportionment of that causal negligence are not independent of one another, but are integrally related in determining ultimate liability." *Ferguson*, 307 Minn. at 37, 239 at N.W.2d at 196.

The logic of the *Ferguson* decision is sound, but its application in the courtroom is problematic. That may be why, in part, there are no subsequent Minnesota appellate decisions regarding this issue. The only sure way to prevent dissenting jurors from "participating" in the apportionment of comparative fault would be to bifurcate deliberations. This presents additional problems, as does the application of *Ferguson* to products liability, contract, or employment cases.

For this reason, the Committee recommends that *Ferguson* be limited to those personal injury cases involving only negligence claims. In those cases, the judge may instruct the jury, using the bracketed language, that the same five jurors need to reach agreement on the negligence, causation, and apportionment questions. Sample language for the signature block on the verdict form could read as follows:

> If you have been unable to reach a unanimous verdict after six hours of deliberation, then five of you may return a verdict. The same five jurors must agree on the answers to Questions __, __, and __.

This language would then be followed with blanks for the signatures of the five jurors.

Polling of the Jury. M.S.A. § 546.16 provides for the polling of the jury following return of the verdict. It is advisable to poll the jury when a five-sixths verdict has been reached, particularly in cases involving a special verdict. *See Sabraski v. Northern States Power Company*, 304 N.W.2d 635 (Minn. 1981).

Sealed Verdict. Custom and convenience have long permitted the use of sealed verdicts in Minnesota. A jury that reaches a verdict while court is adjourned may seal the verdict and then separate. Historically, the sealed verdict was meant to serve as evidence of the state of deliberations at the time of separation, to insure that there was no improper conduct during the separation. The foreperson would keep safe the sealed verdict until the jury would reassemble to be polled at the time the sealed verdict was opened in the presence of the court. *Klemmer v. Biersdorf*, 137 Minn. 474, 475, 163 N.W. 527, 527 (1917); *Kennedy v. Raught*, 6 Minn. 235 (6 Gil. 155) (1861). If a juror dissented when the verdict was returned, the sealed verdict ceased to have any validity.

Even with an agreement that the jury may return a sealed verdict, however, a party may require a polling of the jury. M.S.A. § 546.16 ("Before the verdict is recorded either party may require the jury be polled, whereupon the court administrator shall ask if each juror's verdict is the same as the announced verdict. If any answer is in the negative, the jury shall be sent out for further deliberation"); *Weatherhead v. Burau*, 238 Minn. 134, 137–38, 55 N.W.2d 703, 705 (1952). If one or more jurors dissent from the verdict, it is not error to send the jury out for further deliberation when there is no evidence of improper conduct or improper influence with respect to any juror during the period of separation. *Colstad v. Levine*, 243 Minn. 279, 286, 67 N.W.2d 648, 654 (1954); *Weatherhead v. Burau*, 238 Minn. 134, 137–38, 55 N.W.2d 703, 705 (1952).

Today, practices concerning the use of sealed verdicts vary widely—though the Committee recommends that jurors not be entrusted with the safeguarding of sealed verdicts. Some judges encourage the use of sealed verdicts to avoid the delay that may result while parties and their attorneys are reassembled at the courthouse. In this situation, the trial judge should also seek a waiver from all parties and their attorneys of their right to be present when the verdict is returned.

Communication Between the Judge and Jury. The Minnesota Civil Trialbook § 16 provides that the court may receive written questions from the deliberating jury. When the jury communicates with the court, the court should "review the propriety of any answer with counsel, unless counsel have waived the right to participate or cannot be found after reasonable and diligent search documented by the court." The court may review the answer with counsel either in person or by telephone. The answer to the question should then be made part of the record and given in open court, unless counsel stipulate to some other procedure.

AUTHORITIES

Items That Will Be in the Jury Room. This portion of the instruction is based upon M.S.A. § 546.15 and the Minnesota Civil Trialbook §§ 12 and 15.

Selection of a Foreperson. There is no specific statutory or case law authority compelling the jurors to select a foreperson to preside over the jury's deliberations. Minnesota law provides only that the jury select a foreperson for the purpose of having that person sign a unanimous verdict. M.S.A. § 546.18.

Unanimous Verdict, Five-Sixths Verdict. M.S.A. § 546.17 provides for a five-sixths verdict in a civil action after six hours of deliberation. Minn.R.Civ.P. 48 states that "Unless otherwise provided by law or the parties otherwise stipulate, (1) the verdict shall be unanimous and (2) no verdict shall be taken from a jury reduced in size to fewer than six members."

Sealed Verdict. There is no statutory basis for a sealed verdict in Minnesota, but it is a time-honored practice that has been recognized by Minnesota's courts for over a 10 years. *See Loudy v. Clarke et al.*, 45 Minn. 477, 480, 48 N.W. 25, 26 (1891).

Secrecy of the Jury's Deliberations. It is inappropriate for a jury to receive information in addition to trial evidence, and receipt of such information, if prejudicial, may constitute jury misconduct. *See Ossenfort v. Associated Milk Producers, Inc.*, 254 N.W.2d 672, 686 (Minn. 1977); *Herr & Haydock*, 2 Minnesota Practice: Civil Rules Annotated § 59.10 (4th ed.). To help prevent the possibility of this type of misconduct, and to minimize the possibility of jury tampering, it is appropriate to caution the jury to keep their deliberations confidential.

Communications Between Judge and Jury. The Minnesota Civil Trialbook, § 16, specifies the procedure the trial court should use for receiving questions from the jury.

Juror's Responsibility. The standard for review of the adequacy of a jury award of damages is "whether it is so inadequate or excessive that it could only have been rendered on account of passion or prejudice." *Flanagan v. Lindberg*, 404 N.W.2d 799, 800 (Minn. 1987), *quoting Seim v. Garavalia*, 306 N.W.2d 806, 813 (Minn. 1981). It is proper for the trial judge to admonish the jury to reach a decision based upon the evidence of the case, rather than any feeling of prejudice, sympathy, or bias. *See, e.g., Mueller v. Sigmond*, 486 N.W.2d 841, 844 (Minn. Ct. App. 1992), rev. denied (Minn. Aug. 27, 1992).

Research References

West's Key Number Digest
Trial ⚷133.6(7), 217, 219, 312

Legal Encyclopedias
C.J.S., Trial §§ 329, 331 to 332, 550, 552 to 553, 811 to 812

CATEGORY 12

EVIDENTIARY INSTRUCTIONS

Table of Instructions

CIVJIG 12.10	Direct and Circumstantial Evidence
CIVJIG 12.15	Evaluation of Testimony—Credibility of Witnesses
CIVJIG 12.20	Evaluation of Deposition Evidence
CIVJIG 12.25	Impeachment
CIVJIG 12.30	Expert Testimony
CIVJIG 12.35	Failure to Produce Evidence—Inference
CIVJIG 12.40	Textbooks and Articles

CIVJIG 12.10

DIRECT AND CIRCUMSTANTIAL EVIDENCE

Direct and circumstantial evidence

A fact is proved either by direct evidence or circumstantial evidence or both. The law does not prefer one form of evidence over the other:

1. A fact is proved by direct evidence when, for example, it is proved by a witness who testifies to what he or she saw, heard, or experienced, or by physical evidence of the fact itself.

2. A fact is proved by circumstantial evidence when its existence can be reasonably inferred from other facts proved in the case.

[For example, the fact that "a person walked in the snow" could be proved:

1. By an eyewitness who testified directly that he or she saw a person walking in the snow, or

2. By circumstantial evidence of shoe-prints in the

snow, from which it can be indirectly inferred that a person had walked in the snow.]

Using direct and circumstantial evidence

You should consider both kinds of evidence. The law makes no distinction between the weight given to either direct or circumstantial evidence.

It is up to you to decide how much weight to give any kind of evidence.

USE NOTE

The Minnesota Rules of Evidence do not draw a distinction between direct and circumstantial evidence. Nonetheless, since it is likely that the jury will hear the words "circumstantial evidence" at some point during a trial, it is helpful to define the phrase for the jury.

AUTHORITIES

Either direct or circumstantial evidence may be used to prove a fact in issue. Consequently, while a jury may not rely on speculation or conjecture, a jury may use either direct evidence or reasonable inferences drawn from direct evidence to reach a decision. So, for example, a jury may rely on circumstantial evidence to reach a decision on the issue of liability, so long as the inferences are reasonably justified by the proof in the case. *Zaske ex rel. Bratsch v. Lee*, 651 N.W.2d 527, 533 (Minn. Ct. App.), rev. denied (Dec. 17, 2002); *Illinois Farmers Ins. Co. v. Brekke Fireplace Shoppe, Inc.*, 495 N.W.2d 216, 220 (Minn. Ct. App. 1993).

Research References

West's Key Number Digest
Trial ⚷206, 209

Legal Encyclopedias
C.J.S., Trial §§ 566, 570

CIVJIG 12.15

EVALUATION OF TESTIMONY—CREDIBILITY OF WITNESSES

Guidelines for evaluating testimony

You must decide what testimony to believe and how much weight to give it.

Here are some guidelines:

1. Will a witness gain or lose if this case is decided a certain way?
2. What is the witness's relationship to the parties?
3. How did a witness learn the facts? How did he or she remember and tell the facts?
4. What was his or her manner?
5. What was his or her age and experience?
6. Did the witness seem honest and sincere?
7. Was the witness frank and direct?
8. Is the testimony reasonable compared with other evidence?
9. Are there any other factors that bear on believability and weight?
10. In addition, you should rely upon your own experience, good judgment, and common sense.

USE NOTE

If there is any impeachment of the witness's testimony, give CIVJIG 12.25. It may not be necessary to use CIVJIG 12.15 if CIVJIG 10.15 is given.

AUTHORITIES

The jury is the exclusive judge of the credibility of evidence. *See State v. Larson*, 281 N.W.2d 481, 485, n. 3 (Minn. 1979), cert. denied, 444 U.S. 973, 100 S.Ct. 467, 62 L.Ed.2d 388 (1979). The Minnesota Rules of Evidence permit introduction of a wide range of evidence meant to assist the jury in its role as judge of the credibility of testimony. For example, Rule 616 permits the jury to hear evidence of a witness's bias or interest in the outcome of litigation. *See generally* Peter N. Thompson, 11 Minnesota Practice: Evidence, 3d, §§ 601.01, 602.01, 608.01, and 616.01f (2001). It is improper to single out a particular witness and charge as to the credibility of that witness. *State v. Larson*, 281 N.W.2d 481, 485 (Minn. 1979).

Research References

West's Key Number Digest
Trial 🔑206, 210

Legal Encyclopedias
C.J.S., Trial §§ 566, 571 to 576

CIVJIG 12.20

EVALUATION OF DEPOSITION EVIDENCE

Evaluating evidence given in a deposition

A witness's deposition may be presented when the witness cannot be at the trial in person. The deposition was given under oath.

When a deposition (is) (was) read to you:

1. Give the evidence the same weight as you would if the person was present.
2. Use the same factors as you would in judging any evidence.

The manner of the person reading the deposition is not a factor.

[Evaluation of a videotaped deposition

A witness's deposition may be presented when the witness cannot be at the trial in person. The deposition was given under oath.

When you (are) (were) shown a videotape deposition:

1. Give the evidence the same weight as you would if the person was present.
2. Use the same factors as you would in judging any evidence.]

USE NOTE

This instruction should not be used when a deposition is introduced solely for impeachment purposes. The instruction may appropriately be given at the time the deposition is introduced, as well as at the close of the case. The second bracketed section of the instruction should be used where there is a video deposition.

AUTHORITIES

The use of depositions in court proceedings is covered in Minn.R.Civ.P., Rule 32.01.

Research References

West's Key Number Digest
Trial ⚷206, 210

Legal Encyclopedias
C.J.S., Trial §§ 566, 571 to 576

CIVJIG 12.25

IMPEACHMENT

Guidelines for impeachment

You have heard evidence challenging witnesses' credibility. This is called "impeachment evidence."

[1. Past inconsistent statements

You may consider what the witness did or said in the past, if it is not consistent with what he or she is saying now. This is called a "past inconsistent statement."

Witness a party

If the witness who made the past inconsistent statement is a party (or a party's employee/agent) then you may use the past statement to decide the issues in this case (list the substantive issues) as well as to decide the truth and weight of what the witness is saying now.

Witness not a party

If the witness who made the past inconsistent statement is a not a party and the past statement was not under oath, use it only to decide the truth or weight of what the witness is saying now.

If the past statement was under oath, then you may use the past statement to decide the issues in this case (list the substantive issues) as well as to decide the truth and weight of what the witness is saying now.]

[2. Conviction

You may consider whether the witness has been convicted of a crime. You may consider whether the kind of crime makes it more likely that he or she is not telling the truth.]

[3. Reputation

You may consider a witness's reputation for truthfulness.]

It is up to you whether you accept all, part, or none of witness's testimony.

USE NOTE

Admission of past inconsistent statements: This instruction attempts to explain the distinction between a past inconsistent statement admitted for impeachment purposes only and a statement also admitted for substantive purposes. Most often, a statement will also be admitted because it was made by a party or under oath and is admissible hearsay under Minn.R.Evid. 801(d)(1)(A) or Rule 801(d)(2). A hearsay statement admitted under another exception such as Rule 803, however, may also be used as substantive evidence. In some circumstances, a judge may want to instruct the jury that a statement admitted under one of the other hearsay exceptions can be used for both substantive and impeachment purposes.

Past inconsistent statements admitted as substantive evidence may be used both for impeachment and for proof of the issues in the case. These substantive issues are those which form the basis of the individual questions on the special verdict form. It may be helpful to the juror to tell the expressly what those substantive issue are by listing them—as indicated in the instruction's parenthetical direction. For example, in a motor vehicle case where the threshold issue of permanency is not definitively resolved, the jury might be told: ". . . then you may use the past statement to decide the issues in this case (negligence, causation, damages, permanent injury) as well as to decide the truth and weight of what the witness is saying now."

Reputation: In cases where reputation is an issue, such as defamation cases, the instructions must clearly distinguish between evidence to prove reputation and evidence to impeach by proof of reputation.

AUTHORITIES

1. Conviction of a Crime. The Minnesota Rules of Evidence govern the use of a past conviction to impeach a witness. *See* Minn.R.Evid., Rule 609, committee comment; Peter N. Thompson, 11 Minnesota Practice: Evidence, 3d, § 609.01 to 609.05 (2001). *See also* Minn.Evid.R., Rule 404, providing that evidence of other crimes, wrongs, or acts is inadmissible to prove the character of a person in order to show that he acted in conformity therewith. However, it may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

2. Reputation for Truth and Veracity. A witness may be impeached by means of reputation or opinion evidence. *See*

Minn.R.Evid., Rule 608(a). Admissibility is subject to two limitations: the evidence may refer only to the witness's character for truthfulness or untruthfulness, and evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise." *See* Peter N. Thompson, Minnesota Practice: Evidence, 4th, § 608.01 (2012). *See* Minn.R.Evid., Rule 404(a) as to admissibility of character evidence in general.

3. Prior Inconsistent Statement or Conduct. The procedure for admitting prior inconsistent statements of witnesses is controlled by Minn.R.Evid., Rule 613. Prior inconsistent statements admitted solely for impeachment purposes are not admitted for their truth and are therefore not hearsay. *See* Minn.R.Evid. 801(c). Some prior inconsistent statements are admissible for the truth, however. *See, e.g.*, Minn.R.Evid. 801(d)(1)(A) and 801(d)(2). Rule 613 is inapplicable to party admissions that are admissible as substantive evidence. *See* Minn.R.Evid. Rule 613, committee comment.

4. Contradicted Testimony. If a witness has willfully given false testimony concerning a material point, the jury may, but does not have to, reject the balance of the testimony. Instead, it may give the other testimony such weight as it desires. *See State v. Johnson*, 568 N.W.2d 426, 436 (Minn. 1997), *quoting State v. Poganski*, 257 N.W.2d 578, 581 (Minn. 1977).

Research References

West's Key Number Digest
Trial 🔑210

Legal Encyclopedias
C.J.S., Trial §§ 571 to 576

CIVJIG 12.30

EXPERT TESTIMONY

Opinion testimony

Most witnesses are allowed to testify only about what they saw, heard, or experienced. Usually, they are not allowed to give their opinions.

Some witnesses, called expert witnesses, are allowed to give their opinions, because they have special training, education, and experience.

When you evaluate an expert witness's opinion, you should consider the following guidelines:

1. The education, training, experience, knowledge, and ability of the witness,
2. The reasons given for the opinion,
3. The sources of the information relied upon, and
4. The other guidelines already given to you for any testimony.

You need not give this opinion testimony any more importance than other evidence.

[You have also heard expert testimony about the standard of care a [doctor or other professional] owes to a [patient or client]. You should use this testimony to decide what standard of care was owed to [plaintiff] and whether [defendant] met that standard.]

USE NOTE

The final bracketed sentence should be given in professional malpractice cases.

AUTHORITIES

The admissibility of expert testimony is covered in Minn.R.Evid.

Rules 702 to 706. It is a question for the trial court to determine whether the subject matter of expert testimony will assist the jury; whether the expert is qualified to give the proffered testimony; and whether the foundation for the expert's opinion is sound. *See State v. Grecinger*, 569 N.W.2d 189, 194 (Minn. 1997); *Williams v. Wadsworth*, 503 N.W.2d 120, 123 (Minn. 1993); *and, generally*, Peter N. Thompson, 11 Minnesota Practice: Evidence, 4th, §§ 702.01ff (2012).

In determining the weight and sufficiency of expert testimony, the jury should consider the expert's education, reasoning, sources of information, and factors of witness credibility. *Koch v. Mork Clinic, P.A.*, 540 N.W.2d 526, 530–31 (Minn. Ct. App. 1995); *McKay's Family Dodge v. Hardrives, Inc.*, 480 N.W.2d 141, 146 (Minn. Ct. App. 1992), *quoting Hueper v. Goodrich*, 263 N.W.2d 408, 411 (Minn. 1978). Since the jury can use the same factors used to assess lay witness credibility and expert witness credibility, CIVJIG 12.15 is equally applicable to both lay and expert testimony. *See Koch*, 540 N.W.2d at 530.

In *Goeb v. Tharaldson*, 615 N.W.2d 800 (Minn. 2000), and *Sentinel Mgmt. Co. v. Aetna Cas. & Surety*, 615 N.W.2d 819 (Minn. 2000), the Minnesota Supreme Court reaffirmed the *Frye-Mack* general acceptance test for scientific evidence, and rejected the federal reliability test set forth in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

Research References

West's Key Number Digest
Trial 🔑210

Legal Encyclopedias
C.J.S., Trial §§ 571 to 576

CIVJIG 12.35

FAILURE TO PRODUCE EVIDENCE—INFERENCE

[The Committee recommends no instruction.]

USE NOTE

In the typical case, no instruction on this subject should be given. The following instruction may be given when counsel in argument to the jury has misstated the law with respect to the inference to be drawn by failure of his opponent to produce evidence:

> [If a party either: and fails to give a reasonable explanation, you may decide that the testimony or the evidence would have been unfavorable to that party.]
>
> 1. Does not call a witness who has material evidence, or
>
> 2. Does not produce evidence that the party could reasonably be expected to produce.

This instruction cannot be given if an evidentiary privilege is invoked. Discovery should eliminate need for this instruction in most cases. When an instruction must be given either in ruling on objections to counsel's argument or in the charge to the jury, the above instruction may be used.

AUTHORITIES

An adverse inference may be drawn by the jury if a party fails to produce a witness or evidence within the party's power to produce when the witness or evidence would more naturally favor that party. *Federated Mutual Insurance Co. v. Litchfield Precision Components, Inc.*, 456 N.W.2d 434, 436 (Minn. 1990), citing *Kmetz v. Johnson*, 261 Minn. 395, 402, 113 N.W.2d 96, 101 (1962).

The witness must be available before the inference may be drawn. *See State v. Villalon*, 305 Minn. 547, 549, 234 N.W.2d 189, 191 (1975). If the evidence is equally available to either party, no adverse inference may be drawn against either party for failing to produce the evidence. *Kmetz v. Johnson*, 261 Minn. 395, 402, 113 N.W.2d 96, 101 (1962).

While working as a crewman on the vessel *Joseph L. Block*, the plaintiff in *Willis v. Indiana Harbor Steamship Co., L.L.C.*, 790 N.W.2d 177 (Minn. Ct. App. 2010), was injured when he slipped on the dock and fell. At trial, the plaintiff introduced evidence that the dock had not been properly cleaned after a spill that occurred before the vessel docked, allegedly because the dock owner received untimely notice of the accident. The district court gave a “ ‘spoliation-based negative-inference instruction’” similar to the one set forth in the Use Note. The court of appeals held that it was error for the district court to give the instruction and permit a negative inference be drawn against *the vessel owner* because there was no evidence that the vessel owner had actual physical control of the dock or the condition relating to the spill. *Id.* at 185. Because the appellate court could not conclude that the negative-inference instruction did not prejudice the vessel owner's right to a fair trial, the court reversed the jury's apportionment of liability and remanded for a new trial. *Id.* at 186.

Research References

West's Key Number Digest
Trial ⚷211

Legal Encyclopedias
C.J.S., Trial §§ 501 to 504, 568

CIVJIG 12.40

TEXTBOOKS AND ARTICLES

Evaluating textbooks and articles

> Sections of (textbooks) (articles) have been read to you as evidence in this trial.
>
> Weigh this evidence in the same way you would any other evidence.
>
> You may use this evidence to decide the truth and weight of what witnesses have said.
>
> You also may use this evidence to decide the issues in this case.

AUTHORITIES

Rule 803(18) “Learned treatises” of the Minnesota Rules of Evidence provides:

> To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

A treatise cannot be used for cross-examination unless its authority is established, either through reliance by the expert during direct or reliance of any expert during the trial. *Molkenbur v. Hart*, 411 N.W.2d 249, 253–54 (Minn. Ct. App. 1987), rev. denied (Minn. Oct. 30, 1987); *Sorensen v. Maski*, 361 N.W.2d 498, 501 (Minn. Ct. App. 1985).

Research References

West's Key Number Digest
Trial ⚷206

Legal Encyclopedias
C.J.S., Trial § 566

CATEGORY 14

BURDEN OF PROOF

Table of Instructions

CIVJIG 14.15 Burden of Proof

CIVJIG 14.15

BURDEN OF PROOF

Deciding the issues in a case

You will be asked to answer "yes" or "no" to some questions on the verdict form.

The greater weight of the evidence must support a "yes" answer.

This means that all of the evidence, regardless of which party produced it, must lead you to believe that the claim is more likely true than not true.

Greater weight of the evidence does not necessarily mean the greater number of witnesses or the greater volume of evidence.

Any believable evidence may be enough to prove that a claim is more likely true than not.

USE NOTE

For cases in which proof must be by clear and convincing evidence, this instruction cannot be used, but must be modified to reflect the greater burden of persuasion. CIVJIG 94.10, Punitive Damages, includes a definition of "clear and convincing evidence" for use in cases involving punitive damages.

AUTHORITIES

"Burden of proof" is a generic phrase combining two commonly understood legal concepts: the burden of producing evidence and the burden of persuading the finder of fact. The burden of producing evidence must have been met before the jury is instructed. Consequently, the jury is concerned solely with the burden of persuasion. The Committee believes that jurors understand "proved" to mean "having persuaded." On the other hand, jurors may interpret "burden of proof" to mean "an obligation to produce some evidence." To eliminate this possible confusion, the term "burden of proof" is not used in the instruction.

Traditionally, burden of proof has been defined by the Minnesota Supreme Court as proof by a "fair preponderance of the evidence." See *Canada v. McCarthy*, 567 N.W.2d 496, 507 (Minn. 1997), citing *Carpenter v. Nelson*, 257 Minn. 424, 426, 101 N.W.2d 918, 921 (1960).

One function legitimately performed by the "fair preponderance" definition is to distinguish the ordinary civil case from those rare civil cases where proof must be by clear and convincing evidence, and from the criminal case where proof must be beyond a reasonable doubt. In special civil cases, either the law or contract may require proof by clear and convincing evidence, *see, e.g., Deli v. University of Minnesota*, 511 N.W.2d 46, 52 (Minn. Ct. App. 1994) (just cause for termination of a University employee); *Kavanagh v. The Golden Rule*, 226 Minn. 510, 516, 33 N.W.2d 697, 700 (1948) (parol modification of a written contract); *Hentges v. Schuttler*, 247 Minn. 380, 383, 77 N.W.2d 743, 746 (1956) (rescission of a contract for fraud in the inducement); *but see Spiess v. Brandt*, 230 Minn. 246, 252, 41 N.W.2d 561, 569 (1950) (fair preponderance for rescission of contract for fraud). Clear and convincing evidence may be defined as meaning that a party's evidence should be "unequivocal and uncontradicted, and intrinsically probable and credible." Deli, 511 N.W.2d at 52, citing Kavanagh, 226 Minn. at 516–17, 33 N.W.2d at 700. CIVJIG 94.10, Punitive Damages, includes a definition of "clear and convincing evidence" for use in cases involving punitive damages.

This instruction was cited with approval in *Noske v. Friedberg*, 656 N.W.2d 409, 414 (Minn. Ct. App. 2003).

Research References

West's Key Number Digest
Trial ⚷205

Legal Encyclopedias
C.J.S., Trial §§ 563 to 564

CATEGORY 15

MULTIPLE PARTIES

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CIVJIG 15.10

TWO OR MORE PLAINTIFFS—SEPARATE CLAIMS

Two or more plaintiffs

There are (number) plaintiffs in this lawsuit.

It is the same as though there were (number) lawsuits.

The cases are being tried together only for convenience.

You must answer the questions for each of the plaintiffs separately as though the lawsuits were being tried separately.

USE NOTE

This instruction should not be used where there is a class action under Rule 23 of the Minnesota Rules of Civil Procedure, or where the parties are Rule 19.01 parties under the Minnesota Rules of Civil Procedure.

AUTHORITIES

The Minnesota Rules of Civil Procedure permit two or more claimants to join their separate claims, "if they assert any right to relief, jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of fact or law common to all these persons will arise in the action." Minn.R.Civ.P., Rule 20.01; *Minnesota Mining and Manufacturing Co. v. Nishika Ltd.*, 565 N.W.2d 16, 22 (Minn. 1997); *Boland v. Morrill*, 275 Minn. 496, 502, 148 N.W.2d 143, 148 (1967), overruled on other grounds by *Busch v. Busch Const., Inc.*, 262 N.W.2d 377, 402 (Minn. 1977). Where separate actions involve a common question of law or fact, the trial judge has discretion to order a joint trial of any or all of the matters in issue. Minn.R.Civ.P., Rule 42.01; *see Sorenson v. Kruse*, 293 N.W.2d 56, 62 (Minn. 1980); *Simchuck v. Fullerton*, 299 Minn. 91, 97, 216 N.W.2d 683, 687–688 (1974). In such case, each claim retains its separate identity. *See Peterson v. Minneapolis Star & Tribune*, 282 Minn. 264, 273, 164 N.W.2d 621, 627 (1969); *Indianhead Truck Line, Inc. v. Anderson*, 272 Minn. 497, 501, 139 N.W.2d 271, 274 (1965); *Simon v. Carroll*, 241 Minn. 211, 218, 62 N.W.2d 822, 827 (1954). Consequently, separate judgments and verdicts are necessary. *See generally Ramswick v. Messerer*, 200 Minn. 299, 300, 274 N.W. 179, 179 (1937).

A consolidation of trials is to be distinguished from a consolidation of actions. In the latter situation, the actions do not retain their separate identity but are merged into one. *See, e.g., Anderson v. Connecticut Fire Ins. Co.*, 231 Minn. 469, 482, 43 N.W.2d 807, 816 (1950); *Chellico v. Martire*, 227 Minn. 74, 77, 34 N.W.2d 155, 156 (1948); *Ramswick v. Messerer*, 200 Minn. 299, 300–301, 274 N.W. 179, 180 (1937).

Research References

West's Key Number Digest
Trial ⚷217

Legal Encyclopedias
C.J.S., Trial §§ 552 to 553

CIVJIG 15.15

TWO OR MORE DEFENDANTS (JOINT AND SEVERAL LIABILITY, SEVERAL LIABILITY, OR INDEPENDENT LIABILITY)

Two or more defendants

There are (number) defendants in this lawsuit.

Answer the questions for each defendant as though the lawsuits were being tried separately.

Each defendant must be judged separately.

Do not let your judgment about one defendant influence your judgment about the other(s).

View these instructions separately as they apply to (name of each defendant).

USE NOTE

This instruction is intended for use in cases where two or more defendants are in the lawsuit. It may be used in cases where the plaintiff is seeking to hold two or more defendants jointly and severally liable or only severally liable, where the defendants are separately liable for the harm they have caused or where damages are apportionable among the defendants.

AUTHORITIES

The common law rule was that two or more tortfeasors who acted jointly, concurrently, or successively in causing a single, indivisible injury to the plaintiff would be jointly and severally liable to the plaintiff. *See Ruberg v. Skelly Oil Co.*, 297 N.W.2d 746, 752 (Minn. 1980); *Mathews v. Mills*, 288 Minn. 16, 21, 178 N.W.2d 841, 844 (1970); *Gronquist v. Olson*, 242 Minn. 119, 126, 64 N.W.2d 159, 164 (1954); *Greenwood v. Evergreen Mines Co.*, 220 Minn. 296, 309, 19 N.W.2d 726, 732 (1945).

The common law rule of joint and several liability was modified several times by the legislature through the adoption of a loss reallocation rule and cutoffs limiting the liability of defendants whose fault fell below a certain percentage of fault. In 2003 the legislature retained the loss reallocation rules in M.S.A. ? 604.02, subds. 2 and 3, eliminated the percentage cutoffs, and made the rule of several liability the default rule, subject to four exceptions:

> Subdivision 1. Joint liability. When two or more persons are severally liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that the following persons are jointly and severally liable for the whole award:
>
> (1) a person whose fault is greater than 50 percent;
>
> (2) two or more persons who act in a common scheme or plan that results in injury;
>
> (3) a person who commits an intentional tort; or
>
> (4) a person whose liability arises under chapters 18B - pesticide control, 115 - water pollution control, 115A - waste management, 115B - environmental response and liability, 115C - leaking underground storage tanks, and 299J - pipeline safety, public nuisance law for damage to the environment or the public health, any other environmental or public health law, or any environmental or public health ordinance or program of a municipality as defined in section 466.01.

In order for the finder of fact to have a basis for apportioning fault, the same requirements apply as in making a joint and several liability determination. Once a jury has a basis for apportioning fault, the issue becomes whether one of the exceptions to that rule apply.

Research References

West's Key Number Digest
Trial ⚷217

Legal Encyclopedias
C.J.S., Trial §§ 552 to 553

CIVJIG 15.20

MULTIPLE DEFENDANTS—APPORTIONMENT OF DAMAGES

Division of damages

As judge, I have decided that the responsibility for damages must be divided among the defendants.

As jurors, you must decide which defendant caused which damages.

That is why there is a separate damages question on the verdict form for each defendant.

In question #____, you will decide which damages were caused by (defendant "A").

In question #____, you will decide which damages were caused by (defendant "B").

USE NOTE

It is a question of law for the court to determine whether damages are capable of apportionment. The burden of proving that the damages are capable of being separated lies with each defendant who contends that those damages can be separated. Once the trial court finds that the damages can be apportioned, the question of actual apportionment is a question of fact for the jury. *Canada v. McCarthy*, 567 N.W.2d 496, 507 (Minn. 1997), citing *Mathews v. Mills*, 288 Minn. 16, 20–21, 178 N.W.2d 841, 844–45 (1970). *See also* Restatement (Second) of Torts § 434 cmt. d (1965).

AUTHORITIES

If the joint, concurrent, or successive fault of two or more defendants causes a single, indivisible injury to the plaintiff, the default rule of several liability applies pursuant to M.S.A. § 604.01, subd. 1, subject to the enumerated exceptions. *See, e.g., Mathews v. Mills*, 288 Minn. 16, 21, 178 N.W.2d 841, 844 (1970). If the damage caused by the defendants is apportionable, however, the defendants are responsible for the damages each caused and fault will not be apportioned. The defendant seeking apportionment has the burden of proving that damages are apportionable. *See Canada v. McCarthy*, 567 N.W.2d 496, 507 (Minn. 1997).

Research References

West's Key Number Digest
Negligence ⚷1745; Trial ⚷217

Legal Encyclopedias
C.J.S., Negligence §§ 871, 876 to 878, 883, 892 to 897, 899, 902; Trial §§ 552 to 553

CIVJIG 15.25

NEGLIGENCE—FAULT—HAS BEEN ANSWERED BY THE COURT

One party at fault

> As judge, I have decided that (name) was (at fault) (negligent). So I have answered question #____ "yes."
>
> The fact that I have decided (name) was (at fault) (negligent) must not influence you in deciding whether or not others were (at fault) (negligent).

USE NOTE

If the court finds direct cause as a matter of law, as well as negligence or fault as a matter of law, then CIVJIG 15.25 must be modified accordingly.

Research References

West's Key Number Digest
Negligence ⚷1720 to 1747

Legal Encyclopedias
C.J.S., Negligence §§ 871 to 905

CIVJIG 15.30

DIRECTED VERDICT

One party not at fault

As judge, I have decided that (name) was not (at fault) (negligent). So I have answered question #_____ "no."

The fact that I have decided (name) was not (at fault) (negligent) must not influence you in deciding whether or not others were (at fault) (negligent).

USE NOTE

This instruction is intended for use in situations where it is necessary to explain to the jury the absence of a party determined by the court to be without fault. It is the converse of CIVJIG 15.25.

Research References

West's Key Number Digest
Negligence ⚷1745

Legal Encyclopedias
C.J.S., Negligence §§ 871, 876 to 878, 883, 892 to 897, 899, 902

CIVJIG 15.35

SETTLEMENT AGREEMENTS

Settlement agreement

> (Settling defendant) is no longer a party in this case, because (settling defendant) and (plaintiff) have resolved their differences.
>
> The effect of their settlement should not concern you or the decisions you will be asked to make.
>
> Even though (settling defendant) is no longer a party in the case, you will be asked to decide whether and the degree to which (settling defendant) was (at fault) (negligent).

USE NOTE

In cases where the plaintiff has settled with one of the defendants in a lawsuit, it may be desirable for the court to explain to the jury the reason for the absence of the settling defendant. This instruction is intended for use in those cases.

AUTHORITIES

In *Frey v. Snelgrove*, 269 N.W.2d 918, 923 (Minn. 1978), the supreme court stated that in cases where a settlement and release is executed during the trial, the trial court should usually inform the jury that there has been a settlement and release, if for no other reason than to explain to the jury the reason for the absence of the settling defendant. The court stated that the jury should be given the facts necessary to arrive at a fair verdict to all parties, but as a general rule, the amount paid in settlement should never be submitted. *See also Kelly v. Ellefson*, 712 N.W.2d 759, 766 ff. (Minn. 2006); *Pacific Indem. Co. v. Thompson-Yaeger, Inc.*, 260 N.W.2d 548, 558 (Minn. 1977); *Peterson v. Little-Giant Glencoe Port. Elev. Div.*, 366 N.W.2d 111, 114 (Minn. 1985). The extent to which a settlement should be disclosed will differ from case to case and will rest in the sound discretion of the trial court. *See Frey v. Snelgrove*, 269 N.W.2d 918, 923 (Minn. 1978); *Peterson v. Little-Giant Glencoe Port. Elev. Div.*, 366 N.W.2d 111, 114 (Minn. 1985); *Quill v. Trans World Airlines, Inc.*, 361 N.W.2d 438, 444 (Minn. Ct. App. 1985).

Disclosure is inappropriate where the liability of the non-settling defendant derives from that of the settling defendant, so that, once the liability of the settling defendant has been established, the liability of the non-settling defendant is concluded as well. *See Sorenson v. Kruse*, 293 N.W.2d 56, 62 (Minn. 1980).

In *Pierringer* release cases, the fault of the settling party must be submitted to the jury. *See Frey v. Snelgrove*, 269 N.W.2d 918, 922 (Minn. 1978); *Rediske v. Minnesota Valley Breeder's Ass'n*, 374 N.W.2d 745, 749 (Minn. Ct. App. 1985), rev. granted, 377 N.W.2d 459 (Minn. Dec. 11, 1985), appeal dismissed (Minn. May 15, 1986).

Research References

West's Key Number Digest
Trial ⚷29(1), 203(1), 207

Legal Encyclopedias
C.J.S., Trial §§ 120 to 129, 489, 556 to 557, 560, 567

CIVJIG 15.40

ABSENT PARTIES

Division of fault—absent parties

> Even though (name) (was never) (no longer is) a party in the case, you will still be asked to decide the case as though (name) were a party.

USE NOTE

In Minnesota, the fault of persons who contributed to an accident must be considered by the jury, even if they are not parties to the lawsuit. This instruction is intended to explain to the jury that the absent person's fault must be considered.

AUTHORITIES

In *Lines v. Ryan*, 272 N.W.2d 896, 903 (Minn. 1978), the supreme court stated that the fault of persons who contributed to an accident must be submitted to the jury, even when the person is not a party to the suit. Likewise, the fault of a party who has been released must also be submitted to a jury. *See Frey v. Snelgrove*, 269 N.W.2d 918, 922 (Minn. 1978).

In *Staab v. Diocese of St. Cloud*, 813 N.W.2d 68 (Minn. 2012), the Minnesota Supreme Court concluded that the fault of a person who was not a party to the lawsuit had to be taken into consideration in determining the extent of the liability of the sole defendant in the lawsuit. The plaintiff was injured at a parish school owned and operated by the Diocese of St. Cloud when her husband pushed her wheelchair over a five-inch drop causing her to fall forward and out of the chair. The plaintiff brought suit against the Diocese of St. Cloud. At trial, the fault of the Diocese and the plaintiff's husband was submitted to the jury, which assigned 50% of the fault to the Diocese and 50% to the husband, even though he was not a party to the litigation. *See also Ryan v. McDonough Power Equip. Co.*, 734 F.2d 385, 389 (8th Cir. 1984) (fault of parties to first suit not joined in second because procedural impediment had to be considered in retrial); *Hosley v. Armstrong Cork Co.*, 383 N.W.2d 289, 293 (Minn. 1986), appeal after remand 401 N.W.2d 136 (Minn. Ct. App. 1987); *Schendel v. Hennepin County Med. Center*, 484 N.W.2d 803, 808 (Minn. Ct. App. 1992), rev. denied (Minn. 1992); *Steinbrecher v. McLeod Co-op. Power Ass'n*, 392 N.W.2d 709, 715 (Minn. Ct. App. 1986); *Ripka v. Mehus*, 390 N.W.2d 878, 881 (Minn. Ct. App. 1986).

Research References

West's Key Number Digest
Trial ⚷203(1)

Legal Encyclopedias
C.J.S., Trial §§ 556 to 557, 560

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DIVISION A

CONTRACT AND WARRANTY

CATEGORY 20

CONTRACT

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SPECIAL VERDICT FORMS

CIVSVF 20.90 Breach of Contract Cases

INTRODUCTORY NOTE

The existence of a contract and also its terms are typically questions of fact to be determined by the factfinder. *See Bergstedt, Wahlberg,* *Berquist Associates v. Rothchild*, 302 Minn. 476, 479–480, 225 N.W.2d 261, 263 (1975); *AFSCME Councils 6, 14, 65 and 96, AFL-CIO v. Sundquist*, 338 N.W.2d 560, 567 (Minn. 1983); and *Western Insulation Services, Inc. v. Central Nat. Ins. Co. of Omaha*, 460 N.W.2d 355, 358 (Minn. Ct. App. 1990). "The test of contractual formation is an objective one, to be judged by the words and actions of the parties and not by their subjective mental intent." *Hill v. Okay Construction Co.*, 312 Minn. 324, 332, 252 N.W.2d 107, 114 (1977).

A contract requires the mutual assent of the parties' engaging in the transaction. *See Hy-Vee Food Stores, Inc. v. Minnesota Dept. of Health*, 705 N.W.2d 181, 185 (Minn. 2005). For a contract to be binding, there must be an offer, acceptance, and consideration. *See Tatter v. Board of Education*, 490 F.Supp. 494, 497 (D.Minn. 1980), aff'd, 653 F.2d 315, 316 (8th Cir. 1981) (holding that an offer must be accepted before a contract, whether express or implied, is formed). *See also Cederstrand v. Lutheran Brotherhood*, 263 Minn. 520, 529–532, 117 N.W.2d 213, 219–221 (1962).

"A manifestation of mutual assent 'may be inferred wholly or partly from words spoken or written or from the conduct of the parties.' " *Hy-Vee Food Stores*, 705 N.W.2d at 186, *quoting Cederstrand v. Lutheran Brotherhood*, 263 Minn. 520, 532, 117 N.W.2d 213, 221 (1962). *See also*, *Minneapolis Cablesystems v. Minneapolis*, 299 N.W.2d 121, 122 (Minn. 1980); *Bergstedt, Wahlberg, Berquist Associates, Inc. v. Rothchild*, 302 Minn. 476, 479, 225 N.W.2d 261, 263 (1975) ("Words are not the only medium of commercial expression, and no legal distinction can be made in the effect of a promise whether it is expressed in writing, orally, in the acts of the parties, or in a combination of means."); *Murray v. Puls*, 690 N.W.2d 337, 344 (Minn. Ct. App. 2004).

The test for mutual assent is objective. "Minnesota follows the objective theory of contract formation, under which the parties' outward manifestations are determinative, rather than either party's subjective intent . . . . Thus, a party's intention to make an offer, or to accept an offer made to him, may be inferred from his words and conduct." *Riley Bros. Constr., Inc. v. Shuck*, 704 N.W.2d 197, 202 (Minn.App. 2005) (citation omitted). *See also Asia Pacific Indust. Corp. v. Rainforest Café, Inc.*, 380 F.3d 383, 385 (8th Cir. 2004). The test is whether "one partly by his words or by his conduct, or by both, leads the other to reasonably assume that he assents to and accepts the terms of the other's offer." *Holt v. Swenson*, 252 Minn. 510, 516, 90 N.W.2d 724, 728 (1958). *See also Bergstrom v. Sambo's Restaurants, Inc.*, 687 F.2d 1250, 1256 (8th Cir. 1982); *Bergstedt, Wahlberg, Berquist Associates, Inc. v. Rothchild*, 302 Minn. 476, 479, 225 N.W.2d 261, 263 (1975).

Offer

"An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to the bargain is invited and will conclude it." Restatement (Second) of

Contracts § 24 (1981); *see Day v. Amax, Inc.*, 701 F.2d 1258, 1263 (8th Cir. 1983); *see also League General Insurance Co. v. Tvedt*, 317 N.W.2d 40, 43 (Minn. 1982); *William Weisman Realty Co. v. Cohen*, 157 Minn. 161, 165, 195 N.W. 898, 899 (1923).

An offer must be definite in form. *See Day v. Amax, Inc.*, 701 F.2d 1258, 1263 (8th Cir. 1983); *Pine River State Bank v. Mettille*, 333 N.W.2d 622, 626 (Minn. 1983); *Holt v. Swenson*, 252 Minn. 510, 515, 90 N.W.2d 724, 728 (1958).

The offer must be communicated to the offeree. *See Pine River State Bank v. Mettille*, 333 N.W.2d 622, 626 (Minn. 1983). Restatement (Second) of Contracts § 29 (1981), states that:

> (1) The manifested intention of the offeror determines the person or persons in whom is created a power of acceptance.
>
> (2) An offer may create a power of acceptance in a specified person or in one or more of a specified group or class of persons, acting separately or together, or in anyone or everyone who makes a specified promise or renders a specified performance.

Acceptance

"Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer." Restatement (Second) of Contracts § 50(1) (1981); *see also Holman Erection Co. v. Orville E. Madsen & Sons, Inc.*, 330 N.W.2d 693, 695 (Minn. 1983); *Lake Co. v. Molan*, 269 Minn. 490, 497, 131 N.W.2d 734, 739 (1964). The manifestation of assent incorporated in the acceptance is to be measured by an objective standard. *See Holman Erection Co. v. Orville E. Madsen & Sons, Inc.*, 330 N.W.2d 693, 695 (Minn. 1983), *citing Capital Warehouse Co. v. McGill-Warner-Farnham Co.*, 276 Minn. 108, 114, 149 N.W.2d 31, 35 (1967).

An offer can only be accepted by the person who is invited to furnish the consideration. *See Haugland v. Canton*, 250 Minn. 245, 248–249, 84 N.W.2d 274, 277–278 (1957); Restatement (Second) of Contracts § 52 (1979).

Acceptance may take the form of a promise by the offeree. *See* Restatement (Second) of Contracts § 55 (1979) ("Acceptance by promise may create a contract in which the offeror's performance is completed when the offeree's promise is made."). A promise is "an expression of intention that the promisor will conduct himself in a specified way or bring about a specified result in the future, communicated in such a manner to a promisee, that he may justly expect performance and may reasonably rely thereon." 1 Corbin, Contracts § 13 (1963 & Supp. 1984).

Acceptance by a promise of the offeree will generally not be effective unless the offeror receives notice by the offeree of acceptance. *See*

451 Corp. v. Pension System for Policemen and Firemen of Detroit, 310 N.W.2d 922, 924 (Minn. 1981) (acceptance is effective once it is communicated directly to the offeror by words or actions put into a form that is in fact communicated to the offeror before revocation); *Gorco Construction Co. v. Stein*, 256 Minn. 476, 478, 99 N.W.2d 69, 72 (1959) (contract not formed until acceptance of the orders has been communicated to the customer); Restatement (Second) of Contracts § 56 (1979) ("* * * it is essential to an acceptance by promisee either that the offeree exercise reasonable diligence to notify the offeror of acceptance or that the offeror receive the acceptance seasonably").

The form of acceptance is generally not relevant if objective standards are applied, and mutual assent is present. *See Holman Erection Co. v. Orville Madsen & Sons, Inc.*, 330 N.W.2d 693, 695 (Minn. 1983); *451 Corp. v. Pension System for Policemen and Firemen of Detroit*, 310 N.W.2d 922, 924 (Minn. 1981). If, however, the offer prescribes the place, time, or manner of acceptance, the terms of the offer must be complied with in this respect in order to create a contract. *See* Restatement (Second) of Contracts § 60 (1979).

A valid acceptance must be an unequivocal expression of an intent to create, without more, a contract. *See Markmann v. H. A. Bruntjen Co.*, 249 Minn. 281, 286, 81 N.W.2d 858, 862 (1957), *quoting Minar v. Skoog*, 235 Minn. 262, 265–66, 50 N.W.2d 300, 302 (1951). Conduct or words that manifest acceptance will not be binding unless the offeree "intends to engage in the conduct or has reason to know that the other party may infer from his conduct that he assents." *Holman Erection Co. v. Orville E. Madsen & Sons, Inc.*, 330 N.W.2d 693, 695 (Minn. 1983), *quoting* Restatement (Second) of Contracts § 19(2) (1979).

"An acceptance must comply with the requirements of the offer as to the promise to be made or the performance to be rendered." Restatement (Second) of Contracts § 58 (1979). As set forth in the next section, the Minnesota cases suggest that the requirement of exactitude does not require the acceptance to be a mirror image of the offer. An acceptance is sufficient if it is "coextensive with the offer." *Podany v. Erickson*, 235 Minn. 36, 38, 49 N.W.2d 193, 194 (1951); *see also Markmann v. H. A. Bruntjen Co.*, 249 Minn. 281, 286, 81 N.W.2d 858, 862 (1957) (stating that "an acceptance which differs substantially and materially from the terms of the original offer does not give rise to a completed contract"); *Knaus Truck Lines, Inc. v. Donaldson*, 235 Minn. 453, 457, 51 N.W.2d 99, 102 (1952) ("An acceptance need not repeat the terms of the offer.").

Counteroffer

"A proposal to accept, or an acceptance upon terms varying from those offered, is a rejection of the offer." *Lake Co. v. Molan*, 269 Minn. 490, 497, 131 N.W.2d 734, 739 (1964); *see also Markmann v. H. A. Bruntjen Co.*, 249 Minn. 281, 286, 288–289, 81 N.W.2d 858, 862–863 (1957); *Podany v. Erickson*, 235 Minn. 36, 38, 49 N.W.2d 193, 194 (1951);

Restatement (Second) of Contracts § 59 (1979) ("A reply to an offer which purports to accept it but is conditional on the offeror's assent to terms additional to or different from those offered is not an acceptance but is a counter offer."). However, a requested or suggested modification of the offer will not preclude the formation of a contract where it clearly appears that the offer has been positively accepted, regardless of whether the requests are granted. *Podany v. Erickson*, 235 Minn. 36, 37, 49 N.W.2d 193, 194 (1951).

In *Gresser v. Hotzler*, 604 N.W.2d 379 (Minn. Ct. App. 2000), the court of appeals commented at length on the issue of contract formation:

> Minnesota has applied the modification exception sparingly and only to those cases in which objective manifestations of acceptance existed separately from the suggestions for modifications . . . .
>
> The mirror image rule historically has been strictly construed to forbid even minor variations between offer and acceptance. Many modern courts have relaxed the rule, holding that only an acceptance that differs *materially* from the terms of the original offer prevents contract formation . . . .
>
> The corollary to this modern rule is that an immaterial variation in the acceptance does not impede contract formation. For instance, several courts have held that, under this exception, variations implied in the offer do not interfere with the completed contract . . . .
>
> The Minnesota Supreme Court used the language of the immateriality exception in *Markmann v. H. A. Bruntjen Co.*, 249 Minn. 281, 286, 81 N.W.2d 858, 862 (Minn. 1957). In *Markmann*, the court held that "an acceptance which differs substantially and materially from the terms of the original offer does not give rise to a completed contract." Id. The *Markmann* court did not, however, find an immaterial variation or make clear that it was diverging from its former strict construction of the mirror-image rule. Id. . . . The [defendants] argue that Minnesota caselaw has retained the strict mirror-image rule for real estate contracts, while tempering the rule in its application to other types of contracts. Although we note that the supreme court and this court have more often applied the strict-construction standard in cases involving real estate, caselaw provides no explicit distinction . . . .

604 N.W.2d at 383–84 (citations omitted; emphasis in opinion).

The court in *Gresser* also noted that the definition of what constitutes a material variation is limited. As examples, the court noted the definition in Black's Law Dictionary, which defines a material alteration as "a change in a legal instrument sufficient to alter the instrument's legal meaning or effect." Black's Law Dictionary 78 (7th ed. 1999). The court also cited a Florida Court of Appeals case in which the court concluded that an addition was not a "material variation" because it did not "change the legal effect of the contract." *Kitsos v. Stanford*, 291 So.2d 632, 634 (Fla. App. 1974). The court in *Gresser* agreed that "the focus should be on the legal operation of the contract," so that "only minor changes that do not substantially alter the performance obligations of the parties may be immaterial." 604 N.W.2d at 384.

Rejection

An offeree's power of acceptance is terminated by rejection of the offer by the offeree. *See* Restatement (Second) of Contracts § 38(1) (1979); 1 Corbin, Contracts § 94 (1963 & Supp. 1984). "A manifestation of intention not to accept an offer is a rejection unless the offeree manifests an intention to take it under further advisement." Restatement (Second) of Contracts § 38(2) (1979).

Once an offer is rejected, it is terminated and cannot be subsequently accepted. *See Nodland v. Chirpich*, 307 Minn. 360, 364, 240 N.W.2d 513, 515 (1976); 1 Corbin, Contracts § 94 (1963 & Supp. 1984).

Failure to accept an offer within the time specified in the offer constitutes a rejection unless the offeror extends the time period. *See Callender v. Kalscheuer*, 289 Minn. 532, 533, 184 N.W.2d 811, 812 (1971); Restatement (Second) of Contracts § 41(1) (1979). If no time is specified in an offer, the offer is terminated after a reasonable time. "What is a reasonable time is a question of fact, depending on all the circumstances existing when the offer and attempted acceptance are made." Restatement (Second) of Contracts § 41(2) (1979).

"A proposal to accept, or an acceptance upon terms varying from those offered, is a rejection of the offer * * * ." *Lake Co. v. Molan*, 269 Minn. 490, 497, 131 N.W.2d 734, 739 (1964); *see also Markmann v. H. A. Bruntjen Co.*, 249 Minn. 281, 289, 81 N.W.2d 858, 863 (1957); *Minar v. Skoog*, 235 Minn. 262, 265, 50 N.W.2d 300, 302 (1951); *Podany v. Erickson*, 235 Minn. 36, 38, 49 N.W.2d 193, 194 (1951). However, the acceptance need not repeat the terms of the offer. *See Knaus Truck Lines, Inc. v. Donaldson*, 235 Minn. 453, 457, 51 N.W.2d 99, 102 (1952). "Requested or suggested modifications of the offer will not preclude the formation of a contract where it clearly appears that the offer is positively accepted, regardless of whether the requests are granted." *Podany v. Erickson*, 235 Minn. 36, 38, 49 N.W.2d 193, 194 (1951).

Revocation

An effective revocation terminates the offeree's power of acceptance. *See* 1 Corbin, Contracts § 38 (1963 & Supp. 1984). The offeror may generally revoke his offer at any time prior to acceptance. *See Johnson v. Fitzke*, 234 Minn. 216, 220, 48 N.W.2d 37, 39 (1951), *citing William Weisman Realty Co. v. Cohen*, 157 Minn. 161, 165, 195 N.W. 898, 899 (1923). Acceptance of the offer by the offeree terminates the offeror's power of revocation. *See* 1 Corbin, Contracts § 38 (1963 & Supp. 1984).

Where there is no express provision in the contract concerning the mode of revocation, the revocation is generally not effective unless it has been communicated to the offeree. *See* 1 Corbin, Contracts § 39 (1963 & Supp. 1984). If the terms of the original offer are changed, it is tantamount to a revocation of the offer. *See Sylvestre v. State*, 298 Minn. 142, 157, 214 N.W.2d 658, 667 (1973); *see also Lefkowitz v. Great Minneapolis Surplus Store, Inc.*, 251 Minn. 188, 192, 86 N.W.2d 689, 692 (1957).

Revocation of an offer can be barred by contract. "It is irrevocable if the offeror has promised not to revoke it, or has promised the offered exchange of performances on condition of acceptance within a period of time, and that promise is binding * * * ." *See* Corbin, Contracts § 43 (1963 & Supp. 1984). Partial performance of the act requested by an offer for a unilateral contract bars revocation. *See Sylvestre v. State*, 298 Minn. 142, 156–157, 214 N.W.2d 658, 667 (1973).

Consideration

A promise that is unsupported by valid consideration does not constitute a valid contract. *See Franklin v. Carpenter*, 309 Minn. 419, 422, 244 N.W.2d 492, 495 (1976); *Baehr v. Penn-O-Tex Oil Corp.*, 258 Minn. 533, 538, 104 N.W.2d 661, 665 (1960); *Powell v. MVE Holdings, Inc.*, 626 N.W.2d 451, 463 (Minn. Ct. App. 2001).

The doctrine of consideration is designed to assure that promises that are enforced as contracts are not accidental or gratuitous. The doctrine assures that the promise is the identical result of deliberation as manifested by reciprocal bargaining or negotiations of the parties. *See Baehr v. Penn-O-Tex Oil Corp.*, 258 Minn. 533, 538–539, 104 N.W.2d 661, 665 (1960).

Consideration requires a bargained for performance or return promise. *See* Restatement (Second) of Contracts § 71 (1979). Consideration has been defined as:

> something which is of some value in the eye of the law moving from the plaintiff; it may be some benefit to the defendant or some detriment to the plaintiff. A valuable consideration, in the sense of the law, may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other. Consideration means, not so much that one party is benefited, as that the other suffers detriment.

Johnson v. Kruse, 205 Minn. 237, 241, 285 N.W. 715, 717 (1939). *See also Cady v. Coleman*, 315 N.W.2d 593, 596 (Minn. 1982) (Civil Damage Act case involving barter); *Powell v. MVE Holdings, Inc.*, 626 N.W.2d 451, 463 (Minn. Ct. App. 2001); *and Deli v. Hasselmo*, 542 N.W.2d 649, 656 (Minn. Ct. App. 1996), rev. denied (Minn. Jan. 27, 1999) ("Consideration is something of value given in return for a performance or promise of performance that is bargained for; consideration is what distinguishes a contract from a gift.").

To constitute consideration, a benefit or detriment must be "bargained for." *See National Recruiters, Inc. v. Cashman*, 323 N.W.2d 736, 741 (Minn. 1982); *Davies & Davies Agency, Inc. v. Davies*, 298 N.W.2d 127, 130–131 (Minn. 1980); *Baehr v. Penn-O-Tex Oil Corp.*, 258 Minn. 533, 538–539, 104 N.W.2d 661, 665 (1960). The term " 'bargain' does not mean an exchange of things of equivalent, or any, value. It means a negotiation resulting in the voluntary assumption of an obligation by one party upon condition of an act or forbearance by the other." *Baehr v. Penn-O-Tex Oil Corp.*, 258 Minn. 533, 538–539, 104 N.W.2d 661, 665 (1960); *see also Cederstrand v. Lutheran Brotherhood*, 263 Minn. 520, 530, 117 N.W.2d 213, 220 (1962).

The doctrine of consideration requires mutuality. Consideration must be something that both parties regard as the consideration for the contract. *See Cederstrand v. Lutheran Brotherhood*, 263 Minn. 520, 535, 117 N.W.2d 213, 222–223 (1962); *and Dumas v. Kessler & Maguire Funeral Home, Inc.*, 380 N.W.2d 544, 546 (Minn. Ct. App. 1986). The test as to whether something constitutes consideration is whether the parties dealt with it as though it constituted consideration. *See Baehr v. Penn-O-Tex Oil Corp.*, 258 Minn. 533, 539, 104 N.W.2d 661, 665 (1960). Courts will not inquire into the adequacy of consideration. It is unnecessary that a consideration should be adequate. It is enough if it is something that the law regards as of value. *See Ketterer v. Independent School Dist. No. 1*, 248 Minn. 212, 218–223, 79 N.W.2d 428, 434–437 (1956); *Estrada v. Hanson*, 215 Minn. 353, 356, 10 N.W.2d 223, 225 (1943).

Performance is sufficient consideration for an executed bilateral contract or a unilateral contract. *See Cederstrand v. Lutheran Brotherhood*, 263 Minn. 520, 535, 117 N.W.2d 213, 221–222 (1962); *Hartung v. Billmeier*, 243 Minn. 148, 154, 66 N.W.2d 784, 789–790 (1954). To constitute consideration, the performance may be partial or full. *See Welsh v. Barnes-Duluth Shipbuilding Co.*, 221 Minn. 37, 44, 21 N.W.2d 43, 47 (1945); *Brack v. Brack*, 218 Minn. 503, 508, 16 N.W.2d 557, 560 (1944).

Modification

A contract may be modified when the parties agree to substitute a new contract or different terms for the old contract or terms. Parties can alter their contract by mutual consent without new consideration, for modification is merely substitution of a new contract for an old one and that of itself is a sufficient consideration for the new contract. *Olson v. Penkert*, 252 Minn. 334, 90 N.W.2d 193, 203 (Minn. 1958) *citing Wilson v. Hayes*, 40 Minn. 531, 42 N.W. 467, 471 (1889). *See also Freeman v. Duluth Clinic, Inc.*, 334 N.W.2d 626, 630 (Minn. 1983); *Rye v. Phillips*, 203 Minn. 567, 282 N.W. 459 (1938); *Mitchell v. Rende*, 225 Minn. 145, 30 N.W.2d 27 (1947); *Warrick v. Graffiti, Inc.*, 550 N.W.2d 303, 309 (Minn. Ct. App. 1996); *Badger Equipment Co. v. Brennan*, 431 N.W.2d

900, 904ff (Minn. Ct. App. 1988). Assent to an offer to modify a written contract may be evinced by the conduct and acts of the offeree as well as by express verbal agreement. *Mitchell*, 225 Minn. 145, 30 N.W.2d 27 at 31, *citing Dwyer v. Illinois Oil Co.*, 190 Minn. 616, 252 N.W. 837, 838 (1934); *see also Wolpert v. Foster*, 254 N.W.2d 348, 352, 312 Minn. 526, 532 (Minn. 1977). A party who wants to assert parol modification of a written contract as a defense has the burden of proving it by clear and convincing evidence. *Merickel v. Erickson Stores Corp.*, 255 Minn. 12, 95 N.W.2d 303, 305 (1959); *see also Bolander v. Bolander*, 703 N.W.2d 529, 541 (Minn. Ct. App. 2005).

Novation

A novation occurs when the parties to a contract agree, for consideration, that a third party will perform one of the contracting party's obligations, and that party's obligations will be discharged. The requisites of a novation are a valid obligation to be displaced, the consent of all parties to the substitution, sufficient consideration, the extinction of the old obligation and the creation of a valid new one. *Hanson v. Nelson*, 82 Minn. 220, 84 N.W. 742, 743 (1901). A novation extinguishes the original debt or obligation against the original debtor or obligor and shifts the debt or obligation by mutual agreement to a new party. *Albany Roller Mills, Inc. v. Northern United Feeds & Seeds, Inc.*, 397 N.W.2d 430, 433 (Minn. Ct. App. 1986); *Hanson*, 84 N.W. at 743. The novation requires both mutual agreement and consideration. *Albany Roller Mills, Inc. v. Northern United Feeds & Seeds, Inc.*, 397 N.W.2d 430, 433 (Minn. Ct. App. 1986). The discharge of the old debt must be contemporaneous with and result from the consummation of an arrangement with the new debtor. *Cornwell v. Megins*, 39 Minn. 407, 40 N.W. 610, 611 (1888). The burden of proving a novation is on the debtor who asserts that he has been discharged. *First & Am. Nat'l Bank of Duluth v. Whiteside*, 207 Minn. 537, 292 N.W. 770, 775 (Minn. 1940). Proof of novation must be by evidence of clear and definite intention on the part of all concerned that such is the purpose of their agreement. *Vetter v. Sec. Cont'l Ins. Co.*, 567 N.W.2d 516, 521 (Minn. 1997).

Construction of Contracts

In *Denelsbeck v. Wells Fargo & Co.*, 666 N.W.2d 339, 346–47 (Minn. 2003), the supreme court set out the rules for the construction of contracts:

> The construction and effect of a contract is also a question of law unless the contract is ambiguous. *Turner v. Alpha Phi Sorority House,* 276 N.W.2d 63, 66 (Minn. 1979). "A contract is ambiguous if, based upon its language alone, it is reasonably susceptible of more than one interpretation." *Art Goebel, Inc. v. North Suburban Agencies, Inc.*, 567 N.W.2d 511, 515 (Minn. 1997). The determination of whether a contract is ambiguous is a question of law, *id.* at 515, but the interpretation of an ambiguous contract is a question of fact for the jury. *Turner*, 276 N.W.2d at 66. If a contract is

> unambiguous, the "contract language must be given its plain and ordinary meaning, and shall be enforced by courts even if the result is harsh." *Minneapolis Pub. Hous. Auth. v. Lor*, 591 N.W.2d 700, 704 (Minn. 1999) (footnotes omitted).

See also Bank Midwest, Minnesota, Iowa, N.A. v. Lipetzky, 674 N.W.2d 176, 179 (Minn. 2004); *Fox Sports Net North v. Minnesota Twins Partnership*, 319 F.3d 329, 334 (8th Cir. 2003) (applying Minnesota law).

Parties' Mutual Intent. Every contract, whether written or oral, must be interpreted to give effect to the parties' mutual intent when they made the contract. That mutual intent is determined by the parties' objective manifestations. *See Travertine Corp. v. Lexington-Silverwood*, 683 N.W.2d 267, 271 (Minn. 2004); *Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc.*, 666 N.W.2d 320, 323 (Minn. 2003); *Art Goebel, Inc. v. North Suburban Agencies, Inc.*, 567 N.W.2d 511, 515 (Minn. 1997); *Norwest Bank Minnesota north, N.A. v. Beckler*, 663 N.W.2d 571, 578 (Minn. Ct. App. 2003); *State v. City of Breezy Point*, 394 N.W.2d 592, 596 (Minn. Ct. App. 1986) ("Interpretation of disputed contractual provisions requires the court to place itself in the position of the parties at the time the agreement was negotiated."); *Holman Erection Co. v. Orville E. Madsen & Sons*, 330 N.W.2d 693, 695 (Minn. 1983); *Grimes v. Toensing*, 201 Minn. 541, 277 N.W. 236, 238 (1938).

Contract Interpreted as a Whole. When interpreting a contract, the entire contract should be considered and every term be given effect if at all possible. *Chergosky v. Crosstown Bell, Inc.*, 463 N.W.2d 522, 525–26 (Minn. 1990); *Employers Mut. Liab. Ins. Co. v. Eagles Lodge*, 282 Minn. 477, 165 N.W.2d 554, 556 (1969) (explaining that a contract term must be read in the context of the entire contract); *Egner v. States Realty Co.*, 223 Minn. 305, 26 N.W.2d 464, 470 (1947).

Plain and Ordinary Meaning. Words and phrases in a contract must be given their plain and ordinary meaning unless it is obvious the parties used them with a different meaning. *See, e.g., Turner v. Alpha Phi Sorority House*, 276 N.W.2d 63, 67 (Minn. 1979) (undefined terms are read according to their plain meaning); *Kvidera v. Rotation Engineering and Mrg. Co.*, 705 N.W.2d 416, 420 (Minn. Ct. App. 2005); *and Westphal v. Anderson*, 347 N.W.2d 85, 87 (Minn. Ct. App. 1984).

Negotiations. The parties' negotiations may be considered in determining their mutual intent. *Donnay v. Boulware*, 275 Minn. 37, 44, 144 N.W.2d 711, 716 (1966).

Multiple Contracts Forming One Transaction. When more than one contract is made in a single transaction, all the contracts forming a part of that single transaction should be interpreted together. *Anderson v. Kammeier*, 262 N.W.2d 366, 370–71 (Minn. 1977); *Marso v. Mankato Clinic, Ltd.*, 278 Minn. 104, 153 N.W.2d 281, 288–89 (1967).

Course of Performance. The parties' conduct in the course of performing the contract may be considered in determining their mutual intent. *Fredrich v. Indep. Sch. Dist. 720*, 465 N.W.2d 692, 696 (Minn. Ct. App. 1991) ("the interpretation the parties themselves place on the contract is entitled to great, and perhaps controlling, weight in ascertaining the terms of the contract"); *J.J. Brooksbank Co., Inc. v. Budget Rent-A-Car Corp.*, 337 N.W.2d 372, 375–76 (Minn. 1983); *Telex Corp. v. Data Prods. Corp.*, 271 Minn. 288, 135 N.W.2d 681 (1965) (not a function of courts to rewrite, modify or set aside contract provisions fully considered and agreed upon). *See also Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920, 923 (Minn. 1982); *and, In re Marriage of Brodsky v. Brodsky*, 639 N.W.2d 386, 393 (Minn. Ct. App. 2002).

Breach of Contract

A breach of contract occurs when a party renounces his liability under the contract, makes it impossible by his own act for him to perform his obligation under the contract, or totally or partially fails to perform his contractual obligations. *See Associated Cinemas of America, Inc. v. World Amusement Co.*, 201 Minn. 94, 99, 276 N.W. 7, 10 (1937); *McGuire v. J. Neils Lumber Co.*, 97 Minn. 293, 297, 107 N.W. 130, 132 (1906). "As a general rule, a breach of a contract by one party excuses performance by the other." *Associated Cinemas of America, Inc. v. World Amusement Co.*, 201 Minn. 94, 99, 276 N.W. 7, 10 (1937).

There may be acts of default in the performance of the strict terms of a contract that do not evince any intention to repudiate the contractual obligation. The issue is whether the acts and conduct of the party evinced an intention to no longer be bound by the contract. It need not be an absolute refusal in words. Any clear manifestation by words or acts of an intention not to perform the contract according to its terms will authorize the other party to treat it as a repudiation. *See Armstrong v. St. Paul & Pac. Coal & Iron Co.*, 48 Minn. 113, 118–120, 50 N.W. 1029, 1029 (1892).

Under the Uniform Commercial Code, there must be at a minimum an "overt communication of intention or an action which renders performance impossible or demonstrates a clear determination not to continue with performance." M.S.A. § 336.2-610(1). A secret intention not to perform or a negative attitude does not rise to the level of repudiation. *See Teeman v. Jurek*, 312 Minn. 292, 297, 251 N.W.2d 698, 701 (1977).

"A suggestion for modification of a contract does not amount to a repudiation unless the party makes it clear that he will not perform without the modification." *See Unique Systems, Inc. v. Zotos International, Inc.*, 622 F.2d 373, 377 (8th Cir. 1980) (applying Minnesota law).

Where a party to an executory contract places himself in a position where he cannot perform the contract, or where he otherwise prevents performance of the contract, the other contracting party may treat the contract as anticipatorily breached. *See Wormsbecker v. Donovan Constr. Co.*, 247 Minn. 32, 42, 76 N.W.2d 643, 650 (1956); *Crowell v. Northwestern*

Life & Savings Co., 99 Minn. 214, 219, 108 N.W. 962, 964 (1906). If the injured party has not made an election, or has not changed its position in reliance on the repudiation, the repudiating party may withdraw its repudiation. *See Space Center, Inc. v. 451 Corp.*, 298 N.W.2d 443, 451 (1980).

Promissory Estoppel

The doctrine of promissory estoppel implies a contract where the promisor makes a unilateral or otherwise unenforceable promise, and the promisee relies on the promise to his or her own detriment. *Axelson v. Minneapolis Teachers' Retirement Fund Ass'n*, 544 N.W.2d 297, 299 (Minn. 1996). If a contract does exist, the contract must be enforced, and not the unenforceable promise. The effect of promissory estoppel "is to imply a contract in law where none exists in fact." *Grouse v. Group Health Plan*, 306 N.W.2d 114, 115 (Minn. 1981).

An exception to the rule exists "when the contract is of a type that provides no basis for a contract recovery, i.e., an at-will employment contract." *Gorham v. Benson Optical*, 539 N.W.2d 798, 801 (Minn. Ct. App. 1995). The exception was first recognized in the *Grouse* case.

The elements of promissory estoppel are set out in Restatement (Second) of Contracts § 90 (1981):

> (1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

Damages

The proper measure of damages in a case involving breach of a contract will vary, depending on the type of case. However, the general measure of damages for breach of contract is the amount that will place the nonbreaching party in the same situation as if the contract had been fully performed. *Peters v. Mutual Benefit Life Ins. Co.*, 420 N.W.2d 908, 915 (Minn. Ct. App. 1988); *Sprangers v. Interactive Technologies, Inc.*, 394 N.W.2d 498, 503–504 (Minn. Ct. App. 1986), rev. denied (Minn. Nov. 19, 1986) (*quoting Paine v. Sherwood*, 21 Minn. 225, 232 (1875)).

In *Lesmeister v. Dilly*, 330 N.W.2d 95, 103 (Minn. 1983), the supreme court set out the rule of expectancy damages:

> A nonbreaching party should recover damages sustained by the breach which arose naturally from the breach or could reasonably be supposed to have been contemplated by the parties when making the contract as a probable result of the breach. However, a party recovering damages for breach of contract should not be better off because of the breach than he would have been had there been no breach.

In order for damages to be recoverable, they must have been within the contemplation of both parties at the time the contract was made, or so likely to result from the breach that they can reasonably be said to have been foreseen. *Franklin Mfg. Co. v. Union Pacific R.R. Co.*, 311 Minn. 296, 298, 248 N.W.2d 324, 325 (1976).

Damages for lost profits are recoverable in an appropriate case. In *Cardinal Consulting Co. v. Circo*, 297 N.W.2d 260, 266–267 (Minn. 1980), the court set out the general rule:

> [D]amages in the form of lost profits may be recovered where they are shown to be the natural and probable consequences of the act or omission complained of and their amount is shown with a reasonable degree of certainty and exactness. This means that the nature of the business or venture upon which the anticipated profits are claimed must be such as to support an inference of definite profits grounded upon a reasonably sure basis of facts. * * * This rule does not call for absolute certainty. *Appliances, Inc. v. Queen Stove Works, Inc.*, 228 Minn. 55, 63, 36 N.W.2d 121, 125 (1949) (*quoting* from *Johnson v. Wright*, 175 Minn. 236, 239, 220 N.W. 946, 948 (1928)). The controlling principle is that speculative, remote, or conjectural damages are not recoverable. *Leoni v. Bemis Co.*, 255 N.W.2d 824 (Minn. 1977); *Hornblower & Weeks-Hemphill Noyes v. Lazere*, 301 Minn. 462, 222 N.W.2d 799 (1974); Restatement of Contracts § 331(1) (1932); C. McCormick, Handbook on the Law of Damages § 26 (1935). Our earlier cases held that lost profits of unestablished businesses were not recoverable because they were speculative, remote, or conjectural, and thus incapable of proof, *see, e. g., Village of Elbow Lake v. Otter Tail Power Co.*, 281 Minn. 43, 160 N.W.2d 571 (1968), but this is no longer the law in Minnesota. *See, Leoni v. Bemis Co.*, 255 N.W.2d 824 (Minn. 1977). "Although the law recognizes that it is more difficult to prove loss of prospective profits to a new business than to an established one, the law does not hold that it may not be done." Id. at 826.

Lost profits may be recovered if they are a natural and proximate result of the breach and are proved with reasonable, although not absolute, certainty. *Olson v. Rugloski*, 277 N.W.2d 385, 388 (Minn. 1979). Reasonable certainty depends on the circumstances of the particular case. *Cardinal Consulting Co. v. Circo Resorts*, 297 N.W.2d 260, 267 (Minn. 1980). *See also Edling v. Stanford Tp.*, 381 N.W.2d 881, 884 (Minn. Ct. App. 1986); *and, Olson v. Aretz*, 346 N.W.2d 178, 182 (Minn. Ct. App. 1984).

More recently, however, the Minnesota Supreme Court has allowed suits in negligence for so-called "economic losses," where a contract underlies the relationship between the parties. *See McCarthy Well Company, Inc. v. St. Peter Creamery, Inc.*, 410 N.W.2d 312, 314 (Minn. 1987) (holding negligence action for economic losses not barred when contract is for performance of services); *Prichard Brothers, Inc. v. The Grady Company*, 428 N.W.2d 391, 392 (Minn. 1988) (*citing McCarthy* to hold negligence not barred in service transactions).

CIVJIG 20.10

CONTRACT—ELEMENTS

Definition of a "contract"

A contract exists when the parties agree with reasonable certainty about the same thing, and on the same terms [and at the same time].

In other words, there must be an agreement between the parties on all the essential terms of the contract.

Proof of an agreement

A contract may be made orally, in writing, or by the actions of the parties, or by a combination of all three.

In deciding whether there was an agreement, consider all the circumstances.

How a contract is made

The usual way a contract is made is by an offer from one party, which is accepted by the other party.

There must also be consideration to support the contract.

There may also be counteroffers. The offer may be rejected.

The offer may be revoked.

USE NOTE

This is the basic instruction on the elements necessary to form a contract. The term "offer" is covered in CIVJIG 20.15. "Acceptance" is covered in CIVJIG 20.20. "Counteroffer" is covered in CIVJIG 20.25. "Rejection" is covered in CIVJIG 20.30. "Revocation" is covered in CIVJIG 20.35. "Consideration" is covered in CIVJIG 20.40.

AUTHORITIES

The existence of a contract is a question of fact to be determined by the jury. *See Bergstedt, Wahlberg, Berquist Associates v. Rothchild*, 302

Minn. 476, 479–480, 225 N.W.2d 261, 263 (1975); *Hughes v. Becker*, 260 Minn. 83, 85, 108 N.W.2d 781, 783 (1961). "The test of contractual formation is an objective one, to be judged by the words and actions of the parties and not by their subjective mental intent." *Hill v. Okay Construction Co.*, 312 Minn. 324, 332, 252 N.W.2d 107, 114 (1977).

For a contract to be binding, there must be an offer, acceptance, and consideration. *See Tatter v. Board of Education*, 490 F.Supp. 494, 497 (D.Minn. 1980), aff'd, 653 F.2d 315, 316 (8th Cir. 1981) (holding that an offer must be accepted before a contract, whether express or implied, is formed). *See also Cederstrand v. Lutheran Brotherhood*, 263 Minn. 520, 529–532, 117 N.W.2d 213, 219–221 (1962); *Holt v. Swenson*, 252 Minn. 510, 514–516, 90 N.W.2d 724, 728 (1958).

A contract will be binding on the parties only if there is an agreement between the parties. An agreement is a manifestation of mutual assent, a meeting of the minds concerning the essential elements of the contract. *See Bergstrom v. Sambo's Restaurants, Inc.*, 687 F.2d 1250, 1256, n. 9 (8th Cir. 1982); *Minneapolis Cablesystems v. Minneapolis*, 299 N.W.2d 121, 122 (Minn. 1980); *Bergstedt, Wahlberg, Berquist Associates, Inc. v. Rothchild*, 302 Minn. 476, 479, 225 N.W.2d 261, 263 (1975); *Holt v. Swenson*, 252 Minn. 510, 516, 90 N.W.2d 724, 728 (1958); 1 Corbin, Contracts § 9 (1963 & Supp. 1984) ("[I]t is not necessary that the parties agree on every possible point, but rather, the law requires merely that the parties' intent as to the fundamental terms of the contract can be ascertained with reasonable certainty."). The term "meeting of the minds" does not require a subjective mutual intent to agree on the same things in the same sense. *See Holt v. Swenson*, 252 Minn. 510, 516, 90 N.W.2d 724, 728 (1958). If there is no meeting of the minds on the essential terms of the agreement, there is no contract. *See Bergstrom v. Sambo's Restaurants, Inc.*, 687 F.2d 1250, 1256, n. 9 (8th Cir. 1982); *Malevich v. Hakola*, 278 N.W.2d 541, 544 (Minn. 1979).

The manifestation of mutual assent may be made wholly or partly by written words, spoken words, by the conduct of the parties, or by other acts of the parties. *See Bergstrom v. Sambo's Restaurants, Inc.*, 687 F.2d 1250, 1256 (8th Cir. 1982); *Bergstedt, Wahlberg, Berquist Associates, Inc. v. Rothchild*, 302 Minn. 476, 479, 225 N.W.2d 261, 263 (1975) ("Words are not the only medium of commercial expression, and no legal distinction can be made in the effect of a promise whether it is expressed in writing, orally, in the acts of the parties, or in a combination of means."); *Cederstrand v. Lutheran Brotherhood*, 263 Minn. 520, 531–532, 117 N.W.2d 213, 221 (1962); *Holt v. Swenson*, 252 Minn. 510, 516, 90 N.W.2d 724, 728–729 (1958).

The test for mutual assent is objective. The test is whether "one partly by his words or by his conduct, or by both, leads the other to reasonably assume that he assents to and accepts the terms of the other's offer." *Holt v. Swenson*, 252 Minn. 510, 516, 90 N.W.2d 724, 728 (1958). *See also Bergstrom v. Sambo's Restaurants, Inc.*, 687 F.2d 1250, 1256 (8th Cir. 1982); *Bergstedt, Wahlberg, Berquist Associates, Inc. v. Rothchild*, 302 Minn. 476, 479, 225 N.W.2d 261, 263 (1975).

In *Denelsbeck v. Wells Fargo & Co.*, 666 N.W.2d 339, 346–47 (Minn. 2003), the supreme court set out the rules for the construction of contracts:

> The construction and effect of a contract is also a question of law unless the contract is ambiguous. *Turner v. Alpha Phi Sorority House,* 276 N.W.2d 63, 66 (Minn. 1979). "A contract is ambiguous if, based upon its language alone, it is reasonably susceptible of more than one interpretation." *Art Goebel, Inc. v. North Suburban Agencies, Inc.*, 567 N.W.2d 511, 515 (Minn. 1997). The determination of whether a contract is ambiguous is a question of law, *id.* at 515, but the interpretation of an ambiguous contract is a question of fact for the jury. *Turner*, 276 N.W.2d at 66. If a contract is unambiguous, the "contract language must be given its plain and ordinary meaning, and shall be enforced by courts even if the result is harsh." *Minneapolis Pub. Hous. Auth. v. Lor*, 591 N.W.2d 700, 704 (Minn. 1999) (footnotes omitted).

See also Fox Sports Net North v. Minnesota Twins Partnership, 319 F.3d 329, 334 (8th Cir. 2003) (applying Minnesota law).

Research References

West's Key Number Digest
Contracts ⚷1, 353(2)

Legal Encyclopedias
C.J.S., Architects §§ 33, 40; Contracts §§ 2 to 3, 9, 12, 770, 795 to 796

CIVJIG 20.15

CONTRACT—OFFER

Definition of an "offer"

An "offer" indicates that one party is willing to make a contract.

The offer must be made under circumstances where the other party is justified in understanding that

1. The offer is serious, and

2. Acceptance will result in a contract.

The essential terms of the offer must be reasonably clear, definite, and certain.The offer must be communicated to the other party.

USE NOTE

This instruction is intended for use in cases where there is an issue as to whether an offer was made.

AUTHORITIES

"An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to the bargain is invited and will conclude it." Restatement (Second) of Contracts § 24 (1981); *see Day v. Amax, Inc.*, 701 F.2d 1258, 1263 (8th Cir. 1983); *see also League General Insurance Co. v. Tvedt*, 317 N.W.2d 40, 43 (Minn. 1982); *William Weisman Realty Co. v. Cohen*, 157 Minn. 161, 165, 195 N.W. 898, 899 (1923).

An offer must be definite in form. *See Day v. Amax, Inc.*, 701 F.2d 1258, 1263 (8th Cir. 1983); *Pine River State Bank v. Mettille*, 333 N.W.2d 622, 626 (Minn. 1983); *Holt v. Swenson*, 252 Minn. 510, 515, 90 N.W.2d 724, 728 (1958).

A contract will not fail due to indefiniteness if the parties intended to make a contract, and there is a reasonably certain basis for giving an appropriate remedy. *See Day v. Amax, Inc.*, 701 F.2d 1258, 1263 (8th Cir. 1983), *citing* M.S.A. § 336.2-204(3) (discussing indefiniteness of offers in contracts for sales of goods); *Holt v. Swenson*, 252 Minn. 510, 515, 90 N.W.2d 724, 728 (1958) ("Courts are reluctant to invoke the principle that indefiniteness prevents the creation of a contract where a just result, consistent with a reasonably expressed intent of the parties, can be reached by upholding the agreement.").

The offer must be communicated to the offeree. *See Pine River State Bank v. Mettille*, 333 N.W.2d 622, 626 (Minn. 1983). Restatement (Second) of Contracts § 29 (1979), states that:

> (1) The manifested intention of the offeror determines the person or persons in whom is created a power of acceptance.
>
> (2) An offer may create a power of acceptance in a specified person or in one or more of a specified group or class of persons, acting separately or together, or in anyone or everyone who makes a specified promise or renders a specified performance.

Whether an offer exists is determined by the outward manifestations of the parties and not by their subjective intentions. *See Pine River State Bank v. Mettille*, 333 N.W.2d 622, 626 (Minn. 1983); *Cederstrand v. Lutheran Brotherhood*, 263 Minn. 520, 532, 117 N.W.2d 213, 221 (1962).

As a general rule, both advertisements and announcements to sell at public auction to the highest bidder are presumed to be invitations for an offer of sale on the terms stated. *See Short v. Sun Newspapers, Inc.*, 300 N.W.2d 781, 787 (Minn. 1980); *Lefkowitz v. Great Minneapolis Surplus Store, Inc.*, 251 Minn. 188, 190–191, 86 N.W.2d 689, 690–691 (1957). However, a request for bids at auction that is stated to be "without reserve" may constitute an offer. The phrase "without reserve" is not a formal requirement. Equivalent language may have the same effect. *See Short v. Sun Newspapers, Inc.*, 300 N.W.2d 781, 787 (Minn. 1980).

The test to be applied to determine whether an invitation to bid or an advertisement constitutes an offer is "where the offer is clear, definite, and explicit, and leaves nothing open for negotiation, it constitutes an offer, acceptance of which will complete the contract." *Lefkowitz v. Great Minneapolis Surplus Store, Inc.*, 251 Minn. 188, 191, 86 N.W.2d 689, 691 (1957).

Research References

West's Key Number Digest
Contracts 🔑16, 18, 353(2)

Legal Encyclopedias
C.J.S., Architects §§ 33, 40; Contracts §§ 37 to 41, 44 to 46, 55 to 56, 58, 770, 795 to 796

CIVJIG 20.20

CONTRACT—ACCEPTANCE

"Acceptance" of an offer

> The other party must "accept" the essential terms of the offer without (substantial) (important) change. The acceptance must be communicated to the party who made the offer.
>
> [If the party making the offer asks for a promise, giving the promise is an acceptance.]
>
> [If the party making the offer asks for an act, the start of the act is an acceptance by the other party.]

USE NOTE

This instruction is intended for use in cases where there is an issue as to whether an offer is accepted.

AUTHORITIES

"Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer." Restatement (Second) of Contracts § 50(1) (1981); *see also Holman Erection Co. v. Orville E. Madsen & Sons, Inc.*, 330 N.W.2d 693, 695 (Minn. 1983); *Lake Co. v. Molan*, 269 Minn. 490, 497, 131 N.W.2d 734, 739 (1964). The manifestation of assent incorporated in the acceptance is to be measured by an objective standard. *See Holman Erection Co. v. Orville E. Madsen & Sons, Inc.*, 330 N.W.2d 693, 695 (Minn. 1983), *citing Capital Warehouse Co. v. McGill-Warner-Farnham Co.*, 276 Minn. 108, 114, 149 N.W.2d 31, 35 (1967).

An offer can only be accepted by the person who is invited to furnish the consideration. *See Haugland v. Canton*, 250 Minn. 245, 248–249, 84 N.W.2d 274, 277–278 (1957); Restatement (Second) of Contracts § 52 (1981).

Acceptance may take the form of a promise by the offeree. *See* Restatement (Second) of Contracts § 55 (1981) ("Acceptance by promise may create a contract in which the offeror's performance is completed when the offeree's promise is made."). A promise is "an expression of intention that the promisor will conduct himself in a specified way or bring about a specified result in the future, communicated in such a manner to a promisee, that he may justly expect performance and may reasonably rely thereon." 1 Corbin, Contracts § 13 (1963 & Supp. 1984).

Acceptance by a promise of the offeree will generally not be effective unless the offeror receives notice by the offeree of acceptance. *See 451 Corp. v. Pension System for Policemen and Firemen of Detroit*, 310 N.W.2d 922, 924 (Minn. 1981) (acceptance is effective once it is communicated directly to the offeror by words or actions put into a form that is in fact communicated to the offeror before revocation); *Gorco Construction Co. v. Stein*, 256 Minn. 476, 478, 99 N.W.2d 69, 72 (1959) (contract not formed until acceptance of the orders has been communicated to the customer); Restatement (Second) of Contracts § 56 (1981) ("* * * it is essential to an acceptance by promisee either that the offeree exercise reasonable diligence to notify the offeror of acceptance or that the offeror receive the acceptance seasonably").

Notification will be excused where the offer manifests an intention that notification is not necessary for acceptance. *See* Restatement (Second) of Contracts § 56 (1981).

In certain situations, silence will constitute acceptance. *See Holt v. Swenson*, 252 Minn. 510, 516, 90 N.W.2d 724, 728 (1958) ("It is well settled that acceptance of an offer may be by conduct, and where the relation between the parties is such that the offeror is justified in expecting a reply, or where the offeree is under a duty to reply, the latter's silence will be regarded as an acceptance.").

The form of acceptance is generally not relevant if objective standards are applied, and mutual assent is present. *See Holman Erection Co. v. Orville Madsen & Sons, Inc.*, 330 N.W.2d 693, 695 (Minn. 1983); *451 Corp. v. Pension System for Policemen and Firemen of Detroit*, 310 N.W.2d 922, 924 (Minn. 1981). If, however, the offer prescribes the place, time, or manner of acceptance, the terms of the offer must be complied with in this respect in order to create a contract. *See* Restatement (Second) of Contracts § 60 (1981).

A valid acceptance must be an unequivocal expression of an intent to create, without more, a contract. *See Markmann v. H. A. Bruntjen Co.*, 249 Minn. 281, 286, 81 N.W.2d 858, 862 (1957), quoting *Minar v. Skoog*, 235 Minn. 262, 265–66, 50 N.W.2d 300, 302 (1951). Conduct or words that manifest acceptance will not be binding unless the offeree "intends to engage in the conduct or has reason to know that the other party may infer from his conduct that he assents." *Holman Erection Co. v. Orville E. Madsen & Sons, Inc.*, 330 N.W.2d 693, 695 (Minn. 1983), *quoting* Restatement (Second) of Contracts § 19(2) (1979).

For an acceptance to be valid it must be made in unequivocal and positive terms that comply exactly with the requirements of the offer. If the acceptance varies, adds to, or qualifies the terms of the offer, it is not positive and unequivocal and constitutes a rejection of the offer and a counter offer. For an acceptance to be valid, it must embrace the terms of the offer with exactitude. *See Minar v. Skoog*, 235 Minn. 262, 265–266, 50 N.W.2d 300, 302 (1951).

"An acceptance must comply with the requirements of the offer as to the promise to be made or the performance to be rendered." Restatement (Second) of Contracts § 58 (1981). The Minnesota cases suggest that the requirement of exactitude does not require the acceptance to be a mirror image of the offer. An acceptance is sufficient if it is "coextensive with the offer." *Podany v. Erickson*, 235 Minn. 36, 38, 49 N.W.2d 193, 194 (1951); *see also Markmann v. H. A. Bruntjen Co.*, 249 Minn. 281, 286, 81 N.W.2d 858, 862 (1957) (stating that "an acceptance which differs substantially and materially from the terms of the original offer does not give rise to a completed contract"); *Knaus Truck Lines, Inc. v. Donaldson*, 235 Minn. 453, 457, 51 N.W.2d 99, 102 (1952) ("An acceptance need not repeat the terms of the offer.").

"A proposal to accept, or an acceptance upon terms varying from those offered, is a rejection of the offer." *Lake Co. v. Molan*, 269 Minn. 490, 497, 131 N.W.2d 734, 739 (1964); *see also Markmann v. H. A. Bruntjen Co.*, 249 Minn. 281, 286, 288–289, 81 N.W.2d 858, 862–863 (1957); *Podany v. Erickson*, 235 Minn. 36, 38, 49 N.W.2d 193, 194 (1951); Restatement (Second) of Contracts § 59 (1981) ("A reply to an offer which purports to accept it but is conditional on the offeror's assent to terms additional to or different from those offered is not an acceptance but is a counter-offer."). However, a requested or suggested modification of the offer will not preclude the formation of a contract where it clearly appears that the offer has been positively accepted, regardless of whether the requests are granted. *Podany v. Erickson*, 235 Minn. 36, 38, 49 N.W.2d 193, 194 (1951).

A contract may also be accepted by performance. *See Johnny's Plumbing & Heating, Inc. v. Sperry Rand Corporation-Univac Division*, 298 Minn. 294, 295–296, 215 N.W.2d 63, 64 (1974); *Hartung v. Billmeier*, 243 Minn. 148, 153, 66 N.W.2d 784, 789 (1954).

An offer can be accepted by rendering performance only if the offer invites such an acceptance. *See* Restatement (Second) of Contracts § 53(2) (1981). A contract that is accepted by performance will not be binding unless the performance or forbearance "differs from what the promisee is already obligated to do either by law or by existing contract." *Hartung v. Billmeier*, 243 Minn. 148, 153, 66 N.W.2d 784, 789 (1954).

In *Gresser v. Hotzler*, 604 N.W.2d 379 (Minn. Ct. App. 2000), the court of appeals commented at length on the issue of contract formation:

> Minnesota has applied the modification exception sparingly and only to those cases in which objective manifestations of acceptance existed separately from the suggestions for modifications . . . .
>
> The mirror image rule historically has been strictly construed to forbid even minor variations between offer and acceptance. Many modern courts have relaxed the rule, holding that only an accep-

> tance that differs *materially* from the terms of the original offer prevents contract formation . . . .
>
> The corollary to this modern rule is that an immaterial variation in the acceptance does not impede contract formation. For instance, several courts have held that, under this exception, variations implied in the offer do not interfere with the completed contract . . . .
>
> The Minnesota Supreme Court used the language of the immateriality exception in *Markmann v. H. A. Bruntjen Co.*, 249 Minn. 281, 286, 81 N.W.2d 858, 862 (Minn. 1957). In *Markmann*, the court held that "an acceptance which differs substantially and materially from the terms of the original offer does not give rise to a completed contract." Id. The *Markmann* court did not, however, find an immaterial variation or make clear that it was diverging from its former strict construction of the mirror-image rule. Id. . . . The [defendants] argue that Minnesota caselaw has retained the strict mirror-image rule for real estate contracts, while tempering the rule in its application to other types of contracts. Although we note that the supreme court and this court have more often applied the strict-construction standard in cases involving real estate, caselaw provides no explicit distinction . . . .

604 N.W.2d at 383–84 (citations omitted; emphasis in opinion).

The court in *Gresser* also noted that the definition of what constitutes a material variation is limited. As examples, the court noted the definition in Black's Law Dictionary, which defines a material alteration as "a change in a legal instrument sufficient to alter the instrument's legal meaning or effect." Black's Law Dictionary 78 (7th ed. 1999). The court also cited a Florida Court of Appeals case in which the court concluded that an addition was not a "material variation" because it did not "change the legal effect of the contract." *Kitsos v. Stanford*, 291 So.2d 632, 634 (Fla.Ct.App. 1974). The court in *Gresser* agreed that "the focus should be on the legal operation of the contract," so that "only minor changes that do not substantially alter the performance obligations of the parties may be immaterial." 604 N.W.2d at 384.

Research References

West's Key Number Digest
Contracts ⚷22 to 24, 353(2)

Legal Encyclopedias
C.J.S., Architects §§ 33, 40; Contracts §§ 46 to 54, 65, 770, 795 to 796; Trading Stamps and Coupons §§ 7 to 9

CIVJIG 20.25

CONTRACT—COUNTEROFFER

Definition of "counteroffer"

A response to an offer that changes or adds terms to the offer is a "counteroffer."

This counteroffer means the original offer is rejected.

The counteroffer is the new offer that must be accepted for a contract to result.

USE NOTE

This instruction is intended for use in cases where one party makes a counteroffer, which in turn must be accepted by the other party.

AUTHORITIES

"A proposal to accept, or an acceptance upon terms varying from those offered, is a rejection of the offer." *Lake Co. v. Molan*, 269 Minn. 490, 497, 131 N.W.2d 734, 739 (1964); *see also Markmann v. H. A. Bruntjen Co.*, 249 Minn. 281, 286, 288–289, 81 N.W.2d 858, 862–863 (1957); *Podany v. Erickson*, 235 Minn. 36, 38, 49 N.W.2d 193, 194 (1951); Restatement (Second) of Contracts § 59 (1981) ("A reply to an offer which purports to accept it but is conditional on the offeror's assent to terms additional to or different from those offered is not an acceptance but is a counter offer."). However, a requested or suggested modification of the offer will not preclude the formation of a contract where it clearly appears that the offer has been positively accepted, regardless of whether the requests are granted. *Podany v. Erickson*, 235 Minn. 36, 37, 49 N.W.2d 193, 194 (1951).

Research References

West's Key Number Digest
Contracts ⚷21, 24, 353(2)

Legal Encyclopedias
C.J.S., Architects §§ 33, 40; Contracts §§ 52 to 53, 770, 795 to 796

CIVJIG 20.30

OFFER—REJECTION

Definition of "rejection"

[An offer is "rejected" if the other party changes, adds to, or qualifies the terms of the offer.]

[An offer is "rejected" if the other party makes a counteroffer.]

[An offer is "rejected" if the other party does not accept the essential terms of the offer (in the time stated in the offer) (within a reasonable time) (unless the party making the offer extends the time allowed).]

USE NOTE

This instruction is intended for use in cases where there is an issue as to whether an offer was rejected.

AUTHORITIES

An offeree's power of acceptance is terminated by rejection of the offer by the offeree. *See* Restatement (Second) of Contracts § 38(1) (1981); 1 Corbin, Contracts § 94 (1963 & Supp. 1984). "A manifestation of intention not to accept an offer is a rejection unless the offeree manifests an intention to take it under further advisement." Restatement (Second) of Contracts § 38(2) (1979).

Once an offer is rejected, it is terminated and cannot be subsequently accepted. *See Nodland v. Chirpich*, 307 Minn. 360, 364, 240 N.W.2d 513, 515 (1976); 1 Corbin, Contracts § 94 (1963 & Supp. 1984).

Failure to accept an offer within the time specified in the offer constitutes a rejection unless the offeror extends the time period. *See Callender v. Kalscheuer*, 289 Minn. 532, 533, 184 N.W.2d 811, 812 (1971); Restatement (Second) of Contracts § 41(1) (1981). If no time is specified in an offer, the offer is terminated after a reasonable time. "What is a reasonable time is a question of fact, depending on all the circumstances existing when the offer and attempted acceptance are made." Restatement (Second) of Contracts § 41(2) (1979).

"A proposal to accept, or an acceptance upon terms varying from those offered, is a rejection of the offer * * * ." *Lake Co. v. Molan*, 269

Minn. 490, 497, 131 N.W.2d 734, 739 (1964); *see also Markmann v. H. A. Bruntjen Co.*, 249 Minn. 281, 289, 81 N.W.2d 858, 863 (1957); *Minar v. Skoog*, 235 Minn. 262, 265, 50 N.W.2d 300, 302 (1951); *Podany v. Erickson*, 235 Minn. 36, 38, 49 N.W.2d 193, 194 (1951). However, the acceptance need not repeat the terms of the offer. *See Knaus Truck Lines, Inc. v. Donaldson*, 235 Minn. 453, 457, 51 N.W.2d 99, 102 (1952). "Requested or suggested modifications of the offer will not preclude the formation of a contract where it clearly appears that the offer is positively accepted, regardless of whether the requests are granted." *Podany v. Erickson*, 235 Minn. 36, 38, 49 N.W.2d 193, 194 (1951).

Research References

West's Key Number Digest
Contracts ⚷21, 353(2)

Legal Encyclopedias
C.J.S., Architects §§ 33, 40; Contracts §§ 770, 795 to 796

CIVJIG 20.35

OFFER—REVOCATION

"Revocation" of an offer

> An offer can be "revoked" or withdrawn before it is accepted. The party making the offer must communicate this to the other party.
>
> [An offer made for a specified period of time cannot be revoked during that time.]
>
> [Once the offer is accepted, it may not be revoked or withdrawn.]

USE NOTE

This instruction is intended for use in cases where there is an issue as to whether an offer was revoked. Revocation will turn on whether withdrawal was communicated to the other party prior to acceptance. The bracketed language may be used if there is an issue as to whether the offer was accepted before it was revoked.

AUTHORITIES

An effective revocation terminates the offeree's power of acceptance. *See* 1 Corbin, Contracts § 38 (1963 & Supp. 1984). The offeror may generally revoke his offer at any time prior to acceptance. *See Johnson v. Fitzke*, 234 Minn. 216, 220, 48 N.W.2d 37, 39 (1951), *citing William Weisman Realty Co. v. Cohen*, 157 Minn. 161, 165, 195 N.W. 898, 899 (1923). Acceptance of the offer by the offeree terminates the offeror's power of revocation. *See* 1 Corbin, Contracts § 38 (1963 & Supp. 1984).

Where there is no express provision in the contract concerning the mode of revocation, the revocation is generally not effective unless it has been communicated to the offeree. *See* 1 Corbin, Contracts § 39 (1963 & Supp. 1984). If the terms of the original offer are changed, it is tantamount to a revocation of the offer. *See Sylvestre v. State*, 298 Minn. 142, 157, 214 N.W.2d 658, 667 (1973); *see also Lefkowitz v. Great Minneapolis Surplus Store, Inc.*, 251 Minn. 188, 192, 86 N.W.2d 689, 692 (1957).

Revocation of an offer can be barred by contract. "It is irrevocable if the offeror has promised not to revoke it, or has promised the offered exchange of performances on condition of acceptance within a period of time, and that promise is binding * * * ." *See* Corbin, Contracts § 43 (1963 & Supp. 1984). Partial performance of the act requested by an offer for a unilateral contract bars revocation. *See Sylvestre v. State*, 298 Minn. 142, 156–157, 214 N.W.2d 658, 667 (1973).

Research References

West's Key Number Digest
Contracts ⚿19, 353(2)

Legal Encyclopedias
C.J.S., Architects §§ 33, 40; Contracts §§ 63, 770, 795 to 796

CIVJIG 20.40

OFFER—CONSIDERATION

Definition of "consideration"

> "Consideration" is a benefit received, or something given up or exchanged, as agreed between the parties.

USE NOTE

The concept of consideration is difficult to communicate effectively to a jury. This shortened definition of consideration is drawn from the Revised Arizona Jury Instructions (Civil) (1997) (Contract 7). It is clear that additional instructions may be necessary, but given the complexity of the doctrine, the issue is better addressed on a case-by-case basis than in a lengthy pattern instruction that will result in confusion if read in its entirety.

AUTHORITIES

A promise that is unsupported by valid consideration does not constitute a valid contract. *See Franklin v. Carpenter*, 309 Minn. 419, 422, 244 N.W.2d 492, 495 (1976); *Baehr v. Penn-O-Tex Oil Corp.*, 258 Minn. 533, 538, 104 N.W.2d 661, 665 (1960); *Welsh v. Barnes-Duluth Shipbuilding Co.*, 221 Minn. 37, 44, 21 N.W.2d 43, 47 (1945), *citing William Weisman Realty Co. v. Cohen*, 157 Minn. 161, 165, 195 N.W. 898, 899 (1923).

The doctrine of consideration is designed to assure that promises that are enforced as contracts are not accidental or gratuitous. The doctrine assures that the promise is the identical result of deliberation as manifested by reciprocal bargaining or negotiations of the parties. *See Baehr v. Penn-O-Tex Oil Corp.*, 258 Minn. 533, 538–539, 104 N.W.2d 661, 665 (1960).

Consideration requires a bargained for performance or return promise. *See* Restatement (Second) of Contracts § 71 (1981). Consideration has been defined as:

> something which is of some value in the eye of the law moving from the plaintiff; it may be some benefit to the defendant or some detriment to the plaintiff. A valuable consideration, in the sense of the law, may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other. Consideration means, not so much that one party is benefited, as that the other suffers detriment.

Johnson v. Kruse, 205 Minn. 237, 241, 285 N.W. 715, 717 (1939). *See also Cady v. Coleman*, 315 N.W.2d 593, 596 (Minn. 1982) (Civil Damage Act case involving barter); *Ketterer v. Independent School District No. 1*, 248 Minn. 212, 222–223, 79 N.W.2d 428, 436 (1956); *Estrada v. Hanson*, 215 Minn. 353, 355, 10 N.W.2d 223, 225 (1943).

To constitute consideration, a benefit or detriment must be "bargained for." *See National Recruiters, Inc. v. Cashman*, 323 N.W.2d 736, 741 (Minn. 1982); *Davies & Davies Agency, Inc. v. Davies*, 298 N.W.2d 127, 130–131 (Minn. 1980); *Baehr v. Penn-O-Tex Oil Corp.*, 258 Minn. 533, 538–539, 104 N.W.2d 661, 665 (1960). The term " 'bargain' does not mean an exchange of things of equivalent, or any, value. It means a negotiation resulting in the voluntary assumption of an obligation by one party upon condition of an act or forbearance by the other." *Baehr v. Penn-O-Tex Oil Corp.*, 258 Minn. 533, 538–539, 104 N.W.2d 661, 665 (1960); *see also Cederstrand v. Lutheran Brotherhood*, 263 Minn. 520, 530, 117 N.W.2d 213, 220 (1962).

The doctrine of consideration requires mutuality. Consideration must be something that both parties regard as the consideration for the contract. *See Cederstrand v. Lutheran Brotherhood*, 263 Minn. 520, 535, 117 N.W.2d 213, 222–223 (1962). The test as to whether something constitutes consideration is whether the parties dealt with it as though it constituted consideration. *See Baehr v. Penn-O-Tex Oil Corp.*, 258 Minn. 533, 539, 104 N.W.2d 661, 665 (1960). Courts will not inquire into the adequacy of consideration. It is unnecessary that a consideration should be adequate. It is enough if it is something that the law regards as of value. *See Ketterer v. Independent School Dist. No. 1*, 248 Minn. 212, 218–223, 79 N.W.2d 428, 434–437 (1956); *Estrada v. Hanson*, 215 Minn. 353, 356, 10 N.W.2d 223, 225 (1943).

A promise of a party to a contract to do, or the doing of, something that he is already under a legal obligation to do is not adequate consideration to support the promise of the other party to pay additional compensation for such performance. *See King v. Duluth, M. & N. Ry. Co.*, 61 Minn. 482, 485, 63 N.W. 1105, 1106 (1895).

However, a promise of a party to perform an act that he is already legally obligated to perform may constitute adequate consideration for a new contract, where the party who refuses to complete his contract does so because of some unforeseen and substantial difficulty in the performance of the contract, which was not known or anticipated by the parties when they entered into the contract, and which imposed upon the party an additional burden that was not contemplated by the contracting parties when they entered into the contract. *See King v. Duluth, M. & N. Ry. Co.*, 61 Minn. 482, 487, 63 N.W. 1105, 1107 (1895).

Moral consideration is not sufficient consideration to support a contract. *See Rask v. Norman*, 141 Minn. 198, 201–202, 169 N.W. 704, 706 (1918); *Mason v. Campbell*, 27 Minn. 54, 55, 6 N.W. 405, 405 (1880).

There is no clear consensus as to what constitutes a "moral obligation" or "moral consideration." *See* Restatement (Second) of Contracts § 86 cmt. a (1979).

A valuable consideration sufficient to support a contract does not have to be monetary. An exchange of promises that the promisors treat and consider to be of value to them is sufficient consideration. *See Ketterer v. Independent School Dist. No. 1*, 248 Minn. 212, 222–223, 79 N.W.2d 428, 436 (1956). However, if a promise is to constitute valuable consideration for a bilateral contract, there must be mutuality. This means that there must be reciprocity of obligation. Each party should receive from the other an enforceable promise for the one given in exchange. *See Welsh v. Barnes-Duluth Shipbuilding Co.*, 221 Minn. 37, 44, 21 N.W.2d 43, 47 (1945).

Performance is sufficient consideration for an executed bilateral contract or a unilateral contract. *See Cederstrand v. Lutheran Brotherhood*, 263 Minn. 520, 535, 117 N.W.2d 213, 221–222 (1962); *Hartung v. Billmeier*, 243 Minn. 148, 154, 66 N.W.2d 784, 789–790 (1954); *Welsh v. Barnes-Duluth Shipbuilding Co.*, 221 Minn. 37, 44, 21 N.W.2d 43, 47 (1945); *see also Brack v. Brack*, 218 Minn. 503, 508, 16 N.W.2d 557, 560 (1944). To constitute consideration, the performance may be partial or full. *See Welsh v. Barnes-Duluth Shipbuilding Co.*, 221 Minn. 37, 44, 21 N.W.2d 43, 47 (1945); *Brack v. Brack*, 218 Minn. 503, 508, 16 N.W.2d 557, 560 (1944).

An agreement to forbear or suspend the enforcement of a legal right is sufficient consideration to sustain a promise. *See Baehr v. Penn-O-Tex Oil Corp.*, 258 Minn. 533, 539–540, 104 N.W.2d 661, 666 (1960); *McDonald Bros. Co. v. Koltes*, 155 Minn. 24, 28–29, 192 N.W. 109, 110 (1923); *Bank of Montreal v. Beecher*, 133 Minn. 81, 84, 157 N.W. 1070, 1071 (1916); *see also Anderson v. Nystrom*, 103 Minn. 168, 172–173, 114 N.W. 742, 743–744 (1908).

Research References

West's Key Number Digest
Contracts 🔑49, 353(4)

Legal Encyclopedias
C.J.S., Architects §§ 33, 40; Contracts §§ 87 to 88, 90, 770, 795, 797

CIVJIG 20.41

MODIFICATION

Modification of a Contract

> The parties to a contract may agree to substitute (a new contract) (different term(s)) for the old (contract) (term(s)). This is called a modification. A modification requires no new consideration, and may be proved by a written or verbal agreement, or the conduct and acts of the parties.
>
> [If the modification is not in writing, (name of party asserting modification) must prove the modification by clear and convincing evidence.]

USE NOTE

This instruction is intended for use in cases where there is an issue as to a modification.

AUTHORITIES

A contract may be modified when the parties agree to substitute a new contract or different terms for the old contract or terms. Parties can alter their contract by mutual consent without new consideration, for modification is merely substitution of a new contract for an old one and that of itself is a sufficient consideration for the new contract. *Olson v. Penkert*, 252 Minn. 334, 347–48, 90 N.W.2d 193, 203 (1958), *citing Wilson v. Hayes*, 40 Minn. 531, 540, 42 N.W. 467, 471 (1889). *See also Freeman v. Duluth Clinic, Inc.*, 334 N.W.2d 626, 630 (Minn. 1983); *Rye v. Phillips*, 203 Minn. 567, 282 N.W. 459 (1938); *Mitchell v. Rende*, 225 Minn. 145, 30 N.W.2d 27 (1947); *Warrick v. Graffiti, Inc.*, 550 N.W.2d 303, 309 (Minn. Ct. App. 1996); *Badger Equipment Co. v. Brennan*, 431 N.W.2d 900, 904 (Minn. Ct. App. 1988). Assent to an offer to modify a written contract may be evinced by the conduct and acts of the offeree as well as by express verbal agreement. *Mitchell v. Rende*, 225 Minn. 145, 150, 30 N.W.2d 27, 31 (1947), citing *Dwyer v. Illinois Oil Co.*, 190 Minn. 616, 619, 252 N.W. 837, 838 (1934). *See also Wolpert v. Foster*, 312 Minn. 526, 532, 254 N.W.2d 348, 352 (1977). A party who wants to assert parol modification of a written contract as a defense has the burden of proving it by clear and convincing evidence. *Merickel v. Erickson Stores Corp.*, 255 Minn. 12, 15, 95 N.W.2d 303, 305–306 (1959). *See also Bolander v. Bolander*, 703 N.W.2d 529, 541 (Minn. Ct. App. 2005).

CIVJIG 20.42

NOVATION

Novation of a contract

The parties to a contract may agree to substitute another person to perform one of the party's obligations under the contract. This is called a novation. A novation can only occur if:

1. (Plaintiff), (defendant), and (third party) all had a clear and definite intention to make the substitution,
2. (Plaintiff) and (defendant) agreed, as part of the same transaction, that (third party) would perform (defendant's) obligations under the contract and that (defendant) would be discharged from performing those obligations, and
3. There was consideration for the substitution.

USE NOTE

This instruction is intended for use in cases where there is an issue as to a novation.

AUTHORITIES

A novation occurs when the parties to a contract agree, for consideration, that a third party will perform one of the contracting party's obligations, and that party's obligations will be discharged. The requisites of a novation are a valid obligation to be displaced, the consent of all parties to the substitution, sufficient consideration, the extinction of the old obligation and the creation of a valid new one. *Hanson v. Nelson*, 82 Minn. 220, 221, 84 N.W. 742, 743 (1901). A novation extinguishes the original debt or obligation against the original debtor or obligor and shifts the debt or obligation by mutual agreement to a new party. *Albany Roller Mills, Inc. v. Northern United Feeds and Seeds, Inc.*, 397 N.W.2d 430, 433 (Minn. Ct. App. 1986); *Hanson*, 82 Minn. at 221, 84 N.W. at 743. The novation requires both mutual agreement and consideration. The discharge of the old debt must be contemporaneous with and result from the consummation of an arrangement with the new debtor. *Cornwell v. Megins*, 39 Minn. 407, 409, 40 N.W. 610, 611 (1888). *See also* Restatement (Second) of Contracts § 280 (1981). The burden of proving a novation is on the debtor who asserts that he has been discharged. *First & American Nat. Bank of Duluth v. Whiteside*, 207 Minn. 537, 545, 292 N.W. 770, 775 (1940). Proof of a creditor's assent to a novation cannot be conclusively made by a showing of knowledge of an agreement to have a new party take up the debts of a previous party, acceptance of partial payment, and a demand for the balance of payment. To effect a novation, there must be a "clear and definite intention on the part of all concerned that such is the purpose of their agreement." *Lyon County v. First Nat. Bank*, 166 Minn. 109, 113, 207 N.W. 138, 139 (1926); *Vetter v. Security Continental Ins. Co.*, 567 N.W.2d 516, 521 (Minn. 1997).

CIVJIG 20.45

CONTRACT—BREACH

Definition of "breach of contract"

A contract is breached when there is a failure to perform (a substantial) (an important) part of the contract.

[This breach occurs when one party:]

[Fails to carry out part of the contract that required immediate performance.]

[Fails to carry out a term of the contract by preventing or hindering the term being completed.]

[(Repudiates the contract) (denies that the contract exists).]

USE NOTE

This instruction establishes alternative standards for determining whether a contract was breached. Only the relevant bracketed parts of the instruction should be used. If there is an issue as to whether there was an anticipatory breach or repudiation of a contract, give CIVJIG 20.46.

AUTHORITIES

A breach of contract occurs when a party renounces his liability under the contract, makes it impossible by his own act for him to perform his obligation under the contract, or totally or partially fails to perform his contractual obligations. *See Associated Cinemas of America, Inc. v. World Amusement Co.*, 201 Minn. 94, 99, 276 N.W. 7, 10 (1937); *McGuire v. J. Neils Lumber Co.*, 97 Minn. 293, 297, 107 N.W. 130, 132 (1906). "As a general rule, a breach of a contract by one party excuses performance by the other." *Associated Cinemas of America, Inc. v. World Amusement Co.*, 201 Minn. 94, 99, 276 N.W. 7, 10 (1937).

To establish a claim for breach of contract a plaintiff must prove "(1) formation of a contract, (2) performance by plaintiff of any conditions precedent to his right to demand performance by the defendant, and (3) breach of the contract by defendant." *Park Nicollet Clinic v. Hamann*, 808 N.W.2d 828, 833 (Minn. 2011), *citing Briggs Transporta-*

tion Co. v. Ranzenberger, 299 Minn. 127, 129, 217 N.W.2d 198, 200 (1974).

There may be acts of default in the performance of the strict terms of a contract that do not evince any intention to repudiate the contractual obligation. The issue is whether the acts and conduct of the party evinced an intention to no longer be bound by the contract. It need not be an absolute refusal in words. Any clear manifestation by words or acts of an intention not to perform the contract according to its terms will authorize the other party to treat it as a repudiation. *See Armstrong v. St. Paul & Pac. Coal & Iron Co.*, 48 Minn. 113, 118–120, 50 N.W. 1029, 1029 (1892). *See* CIVJIG 20.46, Contract—Repudiation (Anticipatory Breach).

Research References

West's Key Number Digest
Contracts ⚷315, 353(8)

Legal Encyclopedias
C.J.S., Architects §§ 33, 40; Contracts §§ 561, 770, 795, 800

CIVJIG 20.46

CONTRACT—REPUDIATION (ANTICIPATORY BREACH)

Repudiation

A contract is repudiated when one party to a contract communicates by words or acts to the other party that (he/she) does not intend to perform:

1. Before the time for performance, and
2. Without qualification.

AUTHORITIES

An anticipatory breach of contract is defined as the "unconditional repudiation of a contract, either by words or acts, which is communicated to the other party prior to the time fixed for his performance." *Dyrdal v. Golden Nuggets, Inc.*, 689 N.W.2d 779, 785 n.4 (Minn. 2004), *quoting In re Haugen*, 278 N.W.2d 75, 79 n.6 (Minn. 1979). *See also Space Center, Inc. v. 451 Corp.*, 298 N.W.2d 443, 450 (Minn.1980).

Under the Uniform Commercial Code, there must be at a minimum an "overt communication of intention or an action which renders performance impossible or demonstrates a clear determination not to continue with performance." M.S.A. § 336.2-610(1). A secret intention not to perform or a negative attitude does not rise to the level of repudiation. *See Teeman v. Jurek*, 312 Minn. 292, 297, 251 N.W.2d 698, 701 (1977).

Where a party to an executory contract places himself or herself in a position where he cannot perform the contract, or where he otherwise prevents performance of the contract, the other contracting party may treat the contract as anticipatorily breached. *See Wormsbecker v. Donovan Constr. Co.*, 247 Minn. 32, 42, 76 N.W.2d 643, 650 (1956); *Crowell v. Northwestern Life & Savings Co.*, 99 Minn. 214, 219, 108 N.W. 962, 964 (1906). If the injured party has not chosen to sue immediately or has not changed its position in reliance on the repudiation, the repudiating party may withdraw its repudiation. *See Space Center, Inc. v. 451 Corp.*, 298 N.W.2d 443, 451 (1980).

"A suggestion for modification of a contract does not amount to a repudiation unless the party makes it clear that he will not perform without the modification." *See Unique Systems, Inc. v. Zotos International, Inc.*, 622 F.2d 373, 377 (8th Cir. 1980).

When a party repudiates a contract and the non-breaching party has only partially completed its performance, the non-breaching party may act on the anticipatory breach without completing performance. *Instrumentation Services, Inc. v. General Resource Corp.*, 283 N.W.2d 902, 908–09 (Minn.1979).

CIVJIG 20.50

PROMISSORY ESTOPPEL

Enforcing a promise

One party may be held to a promise made to another, even if there was no contract between them, if the following elements are proved:

1. (Name of party) made a clear and definite promise, and
2. It was reasonably foreseeable to (name of party) that (claimant) would rely on the promise, and
3. (Claimant) relied on the promise, and
4. (Claimant) had losses or was disadvantaged because (he) (she) relied on the promise.

USE NOTE

This instruction is intended for use in cases involving promissory estoppel claims. It may be that not all elements of the claim will be in issue. For example, there may be no issue concerning whether the defendant made a promise to the plaintiff. The only issue may be whether it was reasonably foreseeable that the plaintiff would rely on the promise. The instruction and special verdict form should be tailored to the specific issues raised in the individual case.

One element of a promissory estoppel claim is whether injustice can be avoided only by enforcing the promise. That issue is a question of law for the court.

The supreme court considered whether or not the plaintiff was entitled to a jury trial on her claim for promissory estoppel in *Olson v. Synergistic Technologies Business Systems, Inc.*, 628 N.W.2d 142 (Minn. 2001). The plaintiff in that case alleged that her domestic partner had promised her an interest in his business in exchange for her resources and contributions to the business. In her claim labeled "Promissory Estoppel," the plaintiff alleged, first, that the defendant had made a promise that he knew or should have known would induce her to continue working for the business without compensation; second, that she was justified in relying on his promise; and, third, that fairness requires the court award her a portion of the business's value. The supreme court held that the plaintiff's cause of action was based on equitable good faith reliance, and consequently, the Minnesota Constitution did not entitle her to a jury trial. *Olson v. Synergistic Technologies Business Systems, Inc.*, 628 N.W.2d 142, 153 (Minn. 2001). The court further held that the fact that plaintiff sought monetary relief does not create a right to a jury trial and that Minn.R.Civ.P. 38.01 neither enlarges nor diminishes the right to trial by jury. *Olson v. Synergistic Technologies Business Systems, Inc.*, 628 N.W.2d 142, 154 (Minn. 2001). The court emphasized that this decision did not alter Minnesota case law that a district court has the discretion to decide whether the fact finder in an equitable action will be the judge or a jury. *Olson v. Synergistic Technologies Business Systems, Inc.*, 628 N.W.2d 142, 153 (Minn. 2001).

AUTHORITIES

The doctrine of promissory estoppel implies a contract where the promisor makes a unilateral or otherwise unenforceable promise, and the promisee relies on the promise to his or her own detriment. *Axelson v. Minneapolis Teachers' Retirement Fund Ass'n*, 544 N.W.2d 297, 299 (Minn. 1996). If a contract does exist, the contract must be enforced, and not the unenforceable promise. The effect of promissory estoppel "is to imply a contract in law where none exists in fact." *Grouse v. Group Health Plan*, 306 N.W.2d 114, 115 (Minn. 1981).

An exception to the rule exists "when the contract is of a type that provides no basis for a contract recovery, i.e., an at-will employment contract." *Gorham v. Benson Optical*, 539 N.W.2d 798, 801 (Minn. Ct. App. 1995). The exception was first recognized in the *Grouse* case.

The elements of promissory estoppel are set out in Restatement (Second) of Contracts § 90:

> (1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

Under promissory estoppel, a promise that is expected to induce definite action by the promisee, and does in fact induce that action, is binding if injustice can be avoided only by enforcing the promise. *Cohen v. Cowles Media Co.*, 479 N.W.2d 387, 391 (Minn. 1992). The promise must be clear and definite. The promisor must have intended to induce reliance on the part of the promisee, and the reliance must have occurred to the detriment of the promisee. The third step, whether the promise must be enforced to avoid injustice, is a question of law for the court. *Faimon v. Winona State Univ.*, 540 N.W.2d 879, 883 (Minn. Ct. App. 1995). Factors in this determination include the reasonableness of reliance, a weighing of public policy considerations involving the enforcement of bargains, and the prevention of unjust enrichment. *Faimon v. Winona State Univ.*, 540 N.W.2d 879, 883 (Minn. Ct. App. 1995).

The first issue in a promissory estoppel case is whether there was "a clear and definite promise." *Ruud v. Great Plains Supply, Inc.*, 526 N.W.2d 369, 372 (Minn. 1995); *Cohen v. Cowles Media Co.*, 479 N.W.2d 387, 392 (Minn. 1992). The second, third, and fourth issues require proof that the promisor intended to induce the promisee's reliance on the promise, and that the reliance actually occurred to the detriment of the promisee.

Research References

West's Key Number Digest
Estoppel ⚷52.15, 120

Legal Encyclopedias
C.J.S., Estoppel and Waiver §§ 58, 67, 73, 75 to 78, 81, 85, 120, 219

CIVJIG 20.55

DUTY OF GOOD FAITH AND FAIR DEALING

Definition of "good faith"

> (Name of party or parties) has (have) a duty to act in good faith in (specify the contractual provision in issue).
>
> "Acting in good faith" means a person acts honestly in performing this part of the contract.

USE NOTE

The Minnesota Supreme Court has applied the good faith obligation in requiring that one party not "unjustifiably hinder" the other party's performance of a contract, and that a party to a contract cannot take advantage of the failure of a condition precedent when the party itself has frustrated performance of that condition. Note that the court has not taken the position that there is a covenant of good faith implied in all non-sales contracts.

The supreme court has declined to imply a covenant of good faith and fair dealing in employment contracts.

AUTHORITIES

In *In re Hennepin County 1986 Recycling Bond Litigation*, 540 N.W.2d 494, 502 (Minn. 1995), the Minnesota Supreme Court held that:

> Under Minnesota law, every contract includes an implied covenant of good faith and fair dealing requiring that one party not "unjustifiably hinder" the other party's performance of the contract. *Zobel & Dahl Constr. v. Crotty*, 356 N.W.2d 42, 45 (Minn. 1984); *see also Haase v. Stokely-Van Camp, Inc.*, 257 Minn. 7, 13, 99 N.W.2d 898, 902 (1959); Restatement (Second) of Contracts § 205 (1981). Similarly, we have held that the party to a contract cannot take advantage of the failure of a condition precedent when the party itself has frustrated performance of that condition * * * .

See also Sterling Capital Advisors, Inc. v. Herzog, 575 N.W.2d 121, 124 (Minn. Ct. App. 1998).

In *White Stone Partners, LP v. Piper Jaffray Cos., Inc.*, 978 F.Supp. 878, 881 (D.Minn. 1997), the court predicted that the Minnesota Supreme Court would take the position that there is an implied covenant of good faith and fair dealing in all non-sales contracts in

Minnesota. The issue in the case was whether the covenant of good faith applied to an escape clause that granted defendants "sole discretion" to reject an environmental assessment in a real estate transaction.

The court adopted the Uniform Commercial Code's standard for "good faith," defined as "honesty in fact in the conduct or transaction concerned." M.S.A. § 336.1-201(19), as the appropriate standard for resolving the good faith issue. 978 F.Supp. at 884.

The Minnesota Supreme Court has declined to imply a covenant of good faith and fair dealing into every employment contract, *Hunt v. IBM Mid America Employees Federal Credit Union*, 384 N.W.2d 853 (Minn. 1986); *Singleton v. Christ the Servant Evangelical Lutheran Church*, 541 N.W.2d 606, 613 (Minn. Ct. App. 1996), rev. denied (Minn. March 19, 1996), cert. denied 519 U.S. 870, 117 S.Ct. 184, 136 L.Ed.2d 123 (1996).

Research References

West's Key Number Digest
Contracts ⚷168, 353(6)

Legal Encyclopedias
C.J.S., Architects §§ 33, 40; Contracts §§ 346 to 347, 770, 795, 799

CIVJIG 20.56

DEFENSES—HINDRANCE OF PERFORMANCE

Hindrance of performance

> (Defendant's) obligation to perform the contract may be excused when (defendant) is ready, willing and able to perform the contract, but (plaintiff) (hinders) (obstructs) (prevents) (defendant) from performing or makes it impossible for (defendant) to perform without justification.

USE NOTE

This instruction is to be used in conjunction with CIVJIG 20.55, Duty of Good Faith and Fair Dealing. As indicated in the Use Note for that instruction, the "good faith" requirement is implied in non-sales contracts only to prevent a party from "unjustifiably" hindering the other party's performance.

AUTHORITIES

Generally, contract performance is excused when it is hindered or rendered impossible by the other party. *Zobel & Dahl Const. v. Crotty*, 356 N.W.2d 42, 45 (Minn. 1984); *Wormsbecker v. Donovan Const. Co.*, 247 Minn. 32, 42, 76 N.W.2d 643, 650 (1956); and *Midwest Sports Marketing, Inc. v. Hillerich & Bradsby of Canada, Ltd.*, 552 N.W.2d 254, 268 (Minn. Ct. App. 1996). One who prevents or hinders performance of a condition precedent to completing a contract cannot escape liability if performance would have occurred but for his interference. *Nodland v. Chirpich*, 307 Minn. 360, 240 N.W.2d 513, 516–17 (1976). *See also In re Hennepin County 1986 Recycling Bond Litigation*, 540 N.W.2d 494, 502 (Minn. 1995); and *Minnwest Bank Central v. Flagship Properties LLC*, 689 N.W.2d 295, 300 (Minn. Ct. App. 2004).

CIVJIG 20.60

DAMAGES

Deciding damages for a breach of contract

In answering questions __ and __, you are to determine the amount of money that will fairly and adequately compensate (name of party) for damages caused by the breach of the contract.

The damages award, if any, should put (name of party) in the position (he) (she) would have been in, if the contract had not been breached by (name of party).

[Damages may be awarded for losses that the parties, when they entered the contract, could foresee would probably result if the contract was breached.]

USE NOTE

This instruction is designed to be read in conjunction with a Special Verdict Form, such as CIVSVF 20.90. If the jury does not have a verdict form at the time the instruction is read, then the instruction should be modified.

This instruction sets out the basic rule governing damages awards in cases involving breach of contract. Damages are limited to those that were within the contemplation of the parties at the time they entered into the contract.

Because of the complexity of the rules governing damages awards, there may be more specific damages rules that should be used in individual cases. As an example, the bracketed language in the instruction sets out a more detailed instruction that could be given in cases involving claims for lost profits.

AUTHORITIES

The proper measure of damages in a case involving breach of a contract will vary, depending on the type of case. However, the general measure of damages for breach of contract is the amount that will place the nonbreaching party in the same situation as if the contract had been fully performed. *Peters v. Mutual Benefit Life Ins. Co.*, 420 N.W.2d 908, 915 (Minn. Ct. App. 1988); *Sprangers v. Interactive Technologies,* *Inc.*, 394 N.W.2d 498, 503–504 (Minn. Ct. App. 1986), rev. denied (Minn. Nov. 19, 1986) (quoting *Paine v. Sherwood*, 21 Minn. 225, 232 (1875)).

In *Lesmeister v. Dilly*, 330 N.W.2d 95, 103 (Minn. 1983), the supreme court set out the rule of expectancy damages:

> A nonbreaching party should recover damages sustained by the breach which arose naturally from the breach or could reasonably be supposed to have been contemplated by the parties when making the contract as a probable result of the breach. However, a party recovering damages for breach of contract should not be better off because of the breach than he would have been had there been no breach.

In order for damages to be recoverable, they must have been within the contemplation of both parties at the time the contract was made, or so likely to result from the breach that they can reasonably be said to have been foreseen. *Franklin Mfg. Co. v. Union Pacific R.R. Co.*, 311 Minn. 296, 298, 248 N.W.2d 324, 325 (1976).

Damages for lost profits are recoverable in an appropriate case. In *Cardinal Consulting Co. v. Circo*, 297 N.W.2d 260, 266–267 (Minn. 1980), the court set out the general rule:

> [D]amages in the form of lost profits may be recovered where they are shown to be the natural and probable consequences of the act or omission complained of and their amount is shown with a reasonable degree of certainty and exactness. This means that the nature of the business or venture upon which the anticipated profits are claimed must be such as to support an inference of definite profits grounded upon a reasonably sure basis of facts. * * * This rule does not call for absolute certainty. *Appliances, Inc. v. Queen Stove Works, Inc.,* 228 Minn. 55, 63, 36 N.W.2d 121, 125 (1949) (*quoting* from *Johnson v. Wright*, 175 Minn. 236, 239, 220 N.W. 946, 948 (1928)). The controlling principle is that speculative, remote, or conjectural damages are not recoverable. *Leoni v. Bemis Co.*, 255 N.W.2d 824 (Minn. 1977); *Hornblower & Weeks-Hemphill Noyes v. Lazere*, 301 Minn. 462, 222 N.W.2d 799 (1974); Restatement of Contracts § 331(1) (1932); C. McCormick, Handbook on the Law of Damages § 26 (1935). Our earlier cases held that lost profits of unestablished businesses were not recoverable because they were speculative, remote, or conjectural, and thus incapable of proof, *see, e. g.*, *Village of Elbow Lake v. Otter Tail Power Co.*, 281 Minn. 43, 160 N.W.2d 571 (1968), but this is no longer the law in Minnesota. *See*, *Leoni v. Bemis Co.*, 255 N.W.2d 824 (Minn. 1977). "Although the law recognizes that it is more difficult to prove loss of prospective profits to a new business than to an established one, the law does not hold that it may not be done." *Id.* at 826.

Lost profits may be recovered if they are a natural and proximate result of the breach and are proved with reasonable, although not absolute, certainty. *Olson v. Rugloski*, 277 N.W.2d 385, 388 (Minn. 1979). Reasonable certainty depends on the circumstances of the particular case. *Cardinal Consulting Co. v. Circo Resorts*, 297 N.W.2d 260, 267 (Minn. 1980).

More recently, however, the Minnesota Supreme Court has allowed suits in negligence for so-called "economic losses," where a contract underlies the relationship between the parties. *See McCarthy Well Company, Inc. v. St. Peter Creamery, Inc.*, 410 N.W.2d 312, 314 (Minn. 1987) (holding negligence action for economic losses not barred when contract is for performance of services); *Prichard Brothers, Inc. v. The Grady Company*, 428 N.W.2d 391, 392 (Minn. 1988) (*citing McCarthy* to hold negligence not barred in service transactions).

In *United Prairie Bank-Mountain Lake v. Haugen Nutrition & Equipment, LLC*, 813 N.W.2d 49 (Minn. 2012), the defendant had defaulted on promissory notes held by United Prairie Bank. The loan agreements between the parties provided that Haugen would pay United Prairie's reasonable costs and attorney fees in connection with enforcement of repayment obligations and United Prairie's protection of its security interests. The supreme court held that "a claim for a monetary payment under a contractual indemnity provision is a legal claim with an attendant right to a jury trial under Article I, Section 4 of the Minnesota Constitution."

Research References

West's Key Number Digest
Damages 🔑23, 117 to 126, 218

Legal Encyclopedias
C.J.S., Damages §§ 28 to 33, 108 to 121, 149 to 151, 362

CIVJIG 20.65

MITIGATION OF DAMAGES—CONTRACTS

Limiting damages for breach of contract

> [In determining the amount of damages for breach of contract, take into account the fact that the party asking for damages must act reasonably to limit his or her damages.]

USE NOTE

This instruction may be used in cases involving claims that the plaintiff failed to mitigate damages.

AUTHORITIES

A non-breaching party has a duty to act reasonably in mitigating damages. *See Lesmeister v. Dilly*, 330 N.W.2d 95, 103 (Minn. 1983); Bass v. Equity Residential Holdings, LLC, (Minn. Ct. App. 2004); *Deutz-Allis Credit Corp. v. Jensen*, 458 N.W.2d 163, 166 (Minn. Ct. App. 1990).

Research References

West's Key Number Digest
Damages ⚿62(4), 214

Legal Encyclopedias
C.J.S., Damages §§ 46 to 52, 168, 360

CIVJIG 20.75

DEFENSES—UNILATERAL MISTAKE OF FACT

Unilateral mistake of fact

(Defendant's) obligation to perform the contract may be excused by a unilateral mistake of fact that is important to the contract.

A unilateral mistake of fact occurs when (defendant) is mistaken about an important fact, and:

(Plaintiff) knows or has reason to know that (defendant) is mistaken, and

(Plaintiff) (engages in wrongful conduct) (withholds important information) that (brings about) (causes) the mistake.

A fact is "important" if (defendant) would not have made the contract had (he) (she) (it) known of the mistake about the fact.

USE NOTE

This instruction is to be used in cases where the defense of unilateral mistake of fact has been raised. In cases where mutual mistake of fact is at issue, use CIVJIG 20.76.

AUTHORITIES

"Absent ambiguity, fraud, or misrepresentation, a mistake of one of the parties alone as to the subject matter of the contract is no ground for recission . . . . However, a contract may be avoided by one of the parties for his own mistake of fact when such mistake was caused by the inequitable conduct of the other contracting party." *North Star Center, Inc. v. Sibley Bowl, Inc.*, 295 Minn. 424, 426, 205 N.W.2d 331, 332 (1973) (citations omitted). "If a party conceals a fact material to the transaction, and peculiarly within his own knowledge, knowing that the other party acts on the presumption that no such fact exists, it is as much of a fraud as if the existence of such fact was expressly denied." *Becker v. Bundy*, 177 Minn. 415, 417, 225 N.W. 290 (1929), *quoting Thomas v. Murphy*, 87 Minn. 358, 361, 91 N.W. 1097, 1098 (1902). *See also* Restatement (Second) of Contracts § 153 (1981); *Nadeau v. Maryland Cas. Co.*, 170 Minn. 326, 329, 212 N.W. 595, 596–97 (1927);

A.A. Metcalf Moving & Storage Co., Inc. v. North St. Paul-Maplewood Oakdale Schools, 587 N.W.2d 311, 318 (Minn. Ct. App. 1998).

CIVJIG 20.76

DEFENSES—MUTUAL MISTAKE OF FACT

Mutual mistake of fact

> (Defendant's) obligation to perform the contract may be excused by a mutual mistake of fact that is important to the contract.
>
> A mutual mistake of fact occurs when (plaintiff and defendant) are both mistaken as to an important fact, and (defendant) does not assume the risk of the mistake.
>
> A fact is "important" if (plaintiff and defendant) would not have made the contract had they known of the mistake about the fact.

USE NOTE

This instruction is to be used in cases where mutual mistake of fact is at issue. In cases where the defense of unilateral mistake of fact is raised, use CIVJIG 20.75.

AUTHORITIES

A mistake is material if a party would not have signed the contract had the party known about the mistake. *Serr v. Biwabik Concrete Aggregate Co.*, 202 Minn. 165, 176, 278 N.W. 355, 361–62 (1938); *Beasley v. Medin*, 479 N.W.2d 95, 98 (Minn. Ct. App. 1992). "Absent ambiguity, fraud or misrepresentation, a mistake of one of the parties alone as to subject matter of the contract is no ground for rescission." *North Star Center, Inc. v. Sibley Bowl, Inc.*, 295 Minn. 424, 426, 205 N.W.2d 331, 332 (1973); *Bakke v. Keller*, 220 Minn. 383, 393, 19 N.W.2d 803, 809 (1945). However, a contract may be avoided by one of the parties when his or her unilateral mistake is accompanied by the inequitable conduct of the other party. *North Star Center, Inc.*, 295 Minn. at 426, 205 N.W.2d at 332. The wrongful conduct usually must involve the withholding of important information by one of the parties or actual knowledge by one of the parties of another party's mistake. *Norris v. Cohen*, 223 Minn. 471, 478, 27 N.W.2d 277, 281 (1947). "Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of mistake." Restatement (Second) of Contracts § 152(1) (1981), quoted in *Winter v. Skoglund*, 404 N.W.2d 786, 793

(Minn. 1987). *See also Gartner v. Eikill*, 319 N.W.2d 397, 398–99 (Minn. 1982); *Chalmers v. Kanawyer*, 544 N.W.2d 795, 799 (Minn. Ct. App. 1996); *City of Savage v. Formanek*, 459 N.W.2d 173, 175 (Minn. Ct. App. 1990); *Carpenter v. Vreeman*, 409 N.W.2d 258, 261 (Minn. Ct. App. 1987).

The supreme court held that neither rescission nor reformation were remedies available to the plaintiffs in *SCI Minnesota Funeral Services, Inc. v. Washburn-McReavy Funeral Corp.*, 795 N.W.2d 855 (Minn. 2011). In that case, SCI sold Crystal Lake Cemetery Association to Corinthian Enterprises, LLC in a stock sale agreement. Corinthian later sold Crystal Lake to Washburn-McReavy in a share purchase agreement. Unbeknownst to any of the parties, Crystal Lake's assets included two vacant lots worth approximately $2 million. No language in the stock sale agreement or the share purchase agreement expressly included or excluded the vacant lots. SCI and Corinthian brought an action seeking equitable relief, including reformation of the agreements and recission based on mutual mistake. *Quoting language from Costello v. Sykes*, 143 Minn. 109, 172 N.W. 907, 909 (1919), the SCI Minnesota court held a sale of corporate stock may not be rescinded "merely because both parties were mistaken about the nature or extent of the assets or liabilities of the corporation," as long as the "means of information are open alike to both and there is no concealment of facts or imposition." *SCI Minnesota*, 795 N.W.2d at 862. The court went on to hold that, while *Costello* does not bar reformation of the agreements, SCI and Corinthian did not demonstrate that the agreements failed to express the parties' true intentions or that any such failure was due to a mutual mistake. The employees of SCI who purchased the lots were aware of SCI's ownership of the lots and Minnesota law imputes this knowledge to the entire company. As a matter of law, the court held that because SCI had the right to exclude the vacant lots under the terms of the stock sale agreement, it cannot prove that the agreement did not reflect the parties' true intention. *Id.* at 866.

CIVJIG 20.77

DEFENSES—DURESS

Duress

> (Defendant) has raised the defense that the contract was made under duress. Duress occurs if (defendant's) will is overcome by (physical force) (unlawful threats). In considering whether (defendant's) will was overcome, you may consider all of the evidence, including the means used, the background and relationship of the parties, and (defendant's) age, gender, state of mind, health and other mental characteristics.

USE NOTE

This instruction is intended for use in cases where there is an issue as to duress.

AUTHORITIES

Duress is available as a defense to a contract only when the agreement is coerced by physical force or unlawful threats. *Bond v. Charlson*, 374 N.W.2d 423, 428 (Minn. 1985). *See also St. Louis Park Inv. Co. v. R.L. Johnson Inv. Co., Inc.*, 411 N.W.2d 288, 291 (Minn. Ct. App. 1987). "Duress" is coercion by means of physical force or unlawful threats which destroys the victim's free will and compels him to comply with some demands of the party exerting coercion, and the standards used to evaluate a victim's ability to resist power are personal and subjective rather than objective, and does not involve an analysis of the nature of the threats, but rather, requires an analysis of the state of mind induced in the victim. "The standards of resisting power of the victim are personal and subjective rather than objective—that is, the existence of duress is to be determined by whether the coercion was of such a character as to overcome the free will of the victim rather than that of a person of ordinary courage and firmness." *Wise v. Midtown Motors*, 231 Minn. 46, 51, 42 N.W.2d 404, 407 (1950). Whether a party was coerced to enter into a contract is a subjective inquiry, depending upon the complaining party's state of mind as established by the evidence. The issue is whether a party's free will has been "overcome" in fact by the coercive effect of an externally caused force. *Wise*, 231 Minn. at 51, 42 N.W.2d at 408. "The means used, the age, sex, state of health, and mental characteristics of the victim are all evidentiary, but the ultimate fact in issue is whether such person was bereft of the free exercise of his will power." *Winget v. Rockwood*, 69 F.2d 326, 330 (8th Cir. 1934).

CIVJIG 20.79

DEFENSES—FRUSTRATION

Frustration

(Defendant) has raised the defense of frustration of purpose. Frustration of purpose occurs when:

1. (Defendant's) principal purpose for making the contract is frustrated,
2. Without (defendant's) fault,
3. By the occurrence of an event, and
4. When the parties made the contract, it was a basic assumption that this event would not occur.

The principal purpose must be such an important part of the contract that both (name of parties) understood that without it, the contract would not make sense.

USE NOTE

This instruction is intended for use in cases where there is an issue as to frustration.

AUTHORITIES

The doctrine of frustration of purpose was recognized by the Minnesota Supreme Court in *J.J. Brooksbank Co., Inc. v. Budget Rent-A-Car Corp.*, 337 N.W.2d 372, 377 (Minn. 1983). *See also* Restatement (Second) of Contracts, §§ 261 and 265 (1981); *and Viking Supply v. National Cart Co., Inc.*, 310 F.3d 1092, 1096 (8th Cir. 2002). Three conditions must be shown for the defense of frustration of purpose to apply: (a) the party's principal purpose in making the contract is frustrated; (b) without that party's fault; and (c) by the occurrence of an event or condition, the non-occurrence of which was a basic assumption on which the contract was made. *City of Savage v. Formanek*, 459 N.W.2d 173, 176 (Minn. Ct. App. 1990), rev. denied, (Minn. Oct. 25, 1990); *National Recruiters, Inc. v. Toro Co.*, 343 N.W.2d 704, 707 (Minn. Ct. App. 1984); *Metropolitan Sports Facilities Com'n v. General Mills, Inc.*, 460 N.W.2d 625, 630 (Minn. Ct. App. 1990), aff'd, 470 N.W.2d 118 (Minn. 1991). *See also Little Canada Charity Bingo Hall Ass'n v. Movers Warehouse, Inc.*, 498

N.W.2d 22, 25 (Minn. Ct. App. 1993). The frustrated purpose must be so completely the basis of the contract that, as both parties understand, without it the transaction would make little sense. *City of Savage*, 459 N.W.2d at 176. The party asserting the defense will prevail with a showing that the purpose has become substantially, rather than completely, frustrated. *City of Savage*, 459 N.W.2d at 177. The party asserting the defense must show that the parties did not contemplate the frustrating event when the contract was made. *Metro Sports*, 460 N.W.2d at 630.

CIVJIG 20.80

DEFENSES—IMPOSSIBILITY OR UNDUE HARDSHIP

Impossibility of performance or undue hardship

(Defendant) has raised the defense of (impossibility) (undue hardship). This defense is available when:

1. Because of a fact,
2. That (defendant) did not know about and had no reason to know about when (he) (she) made the contract,
3. [(Defendant's) performance is made impossible.]

[(Defendant's) performance of the contract would cause (defendant) excessive or unreasonable burden, hardship, loss, expense or injury.]

USE NOTE

This instruction is intended for use in cases where there is an issue as to impossibility of performance or undue hardship.

The first bracketed sentence in 3 should be used in cases in which the defendant claims performance was impossible. In cases in which the defendant claims undue hardship, the second sentence should be used.

AUTHORITIES

Except where contrary intent is manifested, and except where impossibility or impracticability of performance is wholly attributable to the subjective ability of the promisor, performance of a contractual duty may be excused when, due to existence of fact or circumstance of which the promisor at time of the making of the contract neither knows nor had reason to know, performance becomes impossible, or becomes impracticable in the sense that performance would cast upon the promisor excessive or unreasonable burden, hardship, loss, expense or injury. *Powers v. Siats*, 244 Minn. 515, 520–21, 70 N.W.2d 344, 348 (1955). Mere difficulty of performance does not ordinarily excuse promisor, but where a great increase in expense or difficulty is caused by circumstances not only unanticipated but inconsistent with the facts from which the parties obviously assumed as likely to continue, a basic reason for excusing promisor from liability may be present. *Powers*, 244 Minn. at 521, 70 N.W.2d at 349. *See also National Farmers Union Property & Cas. Co. v. Fuel Recovery Co., Inc.*, 432 N.W.2d 788, 791 (Minn. Ct. App. 1988); *First Nat. Bank of Shakopee v. Edison Homes, Inc.*, 415 N.W.2d 442, 444 (Minn. Ct. App. 1987); *Burgi v. Eckes*, 354 N.W.2d 514, 518 (Minn. Ct. App. 1984).

CIVJIG 20.81

DEFENSES—ACCORD AND SATISFACTION

No recommended instruction

USE NOTE

M.S.A. § 336.3-311 sets forth the elements of an accord and satisfaction. *See also Webb Business Promotions, Inc. v. American Electronics and Entertainment Corp.*, 617 N.W.2d 67, 72 (Minn. 2000); *and* Restatement (Second) of Contracts § 281 (1981). While the existence of an accord and satisfaction is a question of fact, a dispute as to one of the elements may raise questions of fact appropriate for jury determination or questions of law ripe for judicial resolution. Rather than instructing the jury on all the elements of accord and satisfaction, the Committee recommends framing appropriate special verdict questions to address the relevant questions of fact.

AUTHORITIES

M.S.A. § 336.3-311 provides that:

> (a) If a person against whom a claim is asserted proves that (i) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (ii) the amount of the claim was unliquidated or subject to a bona fide dispute, and (iii) the claimant obtained payment of the instrument, the following subsections apply.
>
> (b) Unless subsection (c) applies, the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.
>
> (c) Subject to subsection (d), a claim is not discharged under subsection (b) if either of the following applies:
>
> (1) The claimant, if an organization, proves that (i) within a reasonable time before the tender, the claimant sent a conspicuous statement to the person against whom the claim is asserted that communications concerning disputed debts, including an instrument tendered as full satisfaction of a debt, are to be sent to a designated person, office, or place, and (ii) the instrument or accompanying communication was not received by that designated person, office, or place.
>
> (2) The claimant, whether or not an organization, proves that within 90 days after payment of the instrument, the claimant tendered

repayment of the amount of the instrument to the person against whom the claim is asserted. This paragraph does not apply if the claimant is an organization that sent a statement complying with paragraph (1)(i).

(d) A claim is discharged if the person against whom the claim is asserted proves that within a reasonable time before collection of the instrument was initiated, the claimant, or an agent of the claimant having direct responsibility with respect to the disputed obligation, knew that the instrument was tendered in full satisfaction of the claim.

See also Webb Business Promotions, Inc. v. American Electronics & Entertainment Corp., 617 N.W.2d 67, 72 (Minn. 2000), citing *Don Kral Inc. v. Lindstrom*, 286 Minn. 37, 173 N.W.2d 921, 923 (1970); Restatement (Second) of Contracts § 281 (1981); 6 Arthur L. Corbin, Corbin on Contracts § 1276 (West 1962). The purpose of accord and satisfaction is to allow parties to resolve disputes without judicial intervention by discharging all rights and duties under a contract in exchange for a stated performance, usually a payment of a sum of money. *Webb*, 617 N.W.2d at 72; *Nelson v. American Family Ins. Group*, 651 N.W.2d 499, 512 (Minn. 2002). The satisfaction is the performance of the accord, generally the acceptance of money, which operates to discharge the debtor's duty as agreed to in the accord. *Webb*, 617 N.W.2d at 72.

Under common law, accord and satisfaction may not be found where mutual agreement is lacking. *Webb*, 617 N.W.2d at 75. Once the elements of § 336.3-311(a) and (b) are met, however, "mutual agreement of the parties to enter into an accord and satisfaction is presumed as a matter of law." *Webb*, 617 N.W.2d at 75. The presumption may be rebutted where the party challenging the accord and satisfaction can demonstrate some ambiguity in the language of the instrument or the accompanying communication such that a reasonable person would not have understood that payment was meant to discharge the obligation. *Webb*, 617 N.W.2d at 76, citing *Imperial Elevator Co. v. Hartford Acc. & Indem. Co.*, 163 Minn. 481, 487–88, 204 N.W. 531, 533–34 (1925).

SPECIAL VERDICT FORMS

CIVSVF 20.90

BREACH OF CONTRACT CASES

1. Was there a contract between the (plaintiff) and the (defendant)?

______ Yes or No

2. *If your answer to Question 1 was "Yes," then answer this question*: Did (defendant) breach (his) (her) (its) contract with the (plaintiff)?

______ Yes or No

3. *If your answer to Question 2 was "Yes," then answer this question*: Did the (defendant's) breach of the contract cause damage to the (plaintiff)?

______ Yes or No

4. *If your answer to Question 3 was "Yes," then answer this question*: What amount of money will fairly and adequately compensate (plaintiff) for the damages caused by the breach of the contract?

$______

USE NOTE

The questions in this Special Verdict Form correspond to the following jury instructions:

1. CIVJIG 20.10: Contract—Elements.
2. CIVJIG 20.45: Contract—Breach.
3. CIVJIG 22.65: Causation.
4. CIVJIG 20.60: Damages.

See the discussion in the Authorities section of CIVJIG 20.60. Question Number 4 should be modified, as appropriate, to reflect the proper measure of damages, depending on the type of case.

CATEGORY 22

WARRANTY

Table of Instructions

CIVJIG 22.10 Express Warranty
CIVJIG 22.15 Express Warranty by Description
CIVJIG 22.20 Express Warranty by Sample or Model
CIVJIG 22.25 Implied Warranty of Merchantability
CIVJIG 22.30 Implied Warranty—Course of Dealing
CIVJIG 22.35 Implied Warranty of Fitness for a Particular Purpose
CIVJIG 22.40 Exclusion or Modification of Warranties
CIVJIG 22.45 Implied Warranty—Exclusion or Modification by a Course of Dealing or Usage of Trade
CIVJIG 22.50 Express Warranty—Breach
CIVJIG 22.55 Implied Warranty of Merchantability—Breach
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CIVJIG 22.65 Causation
CIVJIG 22.70 Warranty—Damages

SPECIAL VERDICT FORMS

CIVSVF 22.90 Warranty Accident Cases
CIVSVF 22.92 Warranty Damages for Difference in Value, and Consequential and Incidental Damages

INTRODUCTORY NOTE

These instructions cover basic warranty law, including express warranty, M.S.A. § 336.2-313, implied warranty of merchantability, M.S.A. § 336.2-314, and implied warranty of fitness for a particular purpose, M.S.A. § 336.2-315. They also include jury instructions on warranty exclusion or modification, M.S.A. § 336.2-316, and exclusion of implied warranties through course of dealing and usage of trade.

These instructions may be used in cases to which the Uniform Commercial Code applies. However, care should be taken to ensure that these instructions are not used in cases where there is a potential overlap between warranty law and products liability law.

Implied warranty of merchantability theory is merged with strict liability and negligence into a single theory of recovery. *Piotrowski v. Southworth Products Corp.*, 15 F.3d 748 (8th Cir. 1994) (citing *Westbrock v. Marshalltown Mfg. Co.*, 473 N.W.2d 352, 356 (Minn. Ct. App. 1991); *Gross v. Running*, 403 N.W.2d 243, 245 (Minn. Ct. App. 1987), and noting that those cases cited *Bilotta v. Kelley Co., Inc.*, 346 N.W.2d 616 (Minn. 1984) for the merger proposition, even though *Bilotta* did not specifically hold that implied warranty theory was merged with strict liability and negligence). However, in cases where the plaintiff in a products liability case asserts products liability theories of recovery, whether the plaintiff's theory of defect is design defect, inadequate warnings, or manufacturing flaw, the plaintiff is entitled in an appropriate case to also assert theories of recovery based on express warranty or implied warranty of fitness for a particular purpose. Those theories rely on statements or representations made by the seller. Those theories are not preempted by products liability theory.

Warranty law applies to sales transactions. In *McCarthy Well Co. v. St. Peter Creamery, Inc.*, 410 N.W.2d 312 (Minn. 1987), the supreme court applied a "predominant factor" test to determine whether a transaction is a sales or service transaction:

> We conclude that the predominant purpose of the McCarthy Well-St. Peter Creamery contract was the provision of services. The creamery hired McCarthy Well to restore the creamery's artesian well to its original capacity. Toward this end, McCarthy Well pulled a liner out of the well casing, airlifted sand out of the well, televised the well, attempted to remove a donut from the well casing, exploded dynamite at the bottom of the well, and installed a new pump. After installing the pump, McCarthy Well billed the creamery $34,573.27; of this amount, only $8,329.45 is identified as the cost of the new pump.

McCarthy Well Co. v. St. Peter Creamery, Inc., 410 N.W.2d 312, 315 (Minn. 1987).

For a more detailed discussion of the kinds of transactions to which products liability theory applies, *see* the Introductory Note to Category 75 (Products Liability).

CIVJIG 22.10

EXPRESS WARRANTY

Proof of express warranty by affirmation or promise

An express warranty by affirmation is created if:

1. The seller makes an affirmation of fact or promise to a buyer, and
2. The affirmation or promise relates to the goods, and
3. The affirmation or promise becomes part of the basis for the bargain.

Definition of "affirmation"

An "affirmation of fact" is a statement of facts relating to the subject matter of the sale.

Basis of the bargain

A statement of facts or promise is part of the "basis of the bargain" if it played a part in the agreement between the seller and the buyer.

Effect of the express warranty by affirmation or promise

With the express warranty by affirmation or promise, the seller warrants to the buyer that the goods will conform to the affirmation or promise.

AUTHORITIES

An express warranty rests on "dickered" aspects of the individual bargain. *See* Uniform Commercial Code § 2-313, Comment 1. Minnesota has adopted the express warranty theory of section 2-313 of the Uniform Commercial Code. *See* M.S.A. § 336.2-313. In Minnesota, the following express warranties may be created by the parties:

(a) Any affirmation of fact or promise made by the seller to the buyer that relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods that is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model that is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

M.S.A. § 336.2-313.

Prior to the adoption of the Uniform Commercial Code, a buyer was required to prove that he relied on the warranty. *See generally* J. White & R. Summer, Handbook of the Law Under the Uniform Commercial Code, § 9-4, at 332 (discussing pre-Code analysis of express warranties), and Murray, "Basis of the Bargain": Transcending Classical Concepts, 66 Minn.L.Rev. 283, 285–287 (1982) (discussing pre-Code reliance requirement).

Under the Code, as adopted in Minnesota, the buyer need only establish that the affirmation of fact, promise, description, sample, or model is "part of the basis of the bargain." *See* M.S.A. § 336.2-313(1). The term "part of the basis of the bargain" eliminates the requirement of reliance on the part of the buyer. An affirmation, promise, description, or sample does not have to induce the buyer to purchase the goods. *See* M.S.A. § 336.2-313, Minnesota Code Comment; M.S.A. § 2-313(1)(a); Uniform Commercial Code sec. 2-313, Comment 3.

The scope of the definition of "part of the basis of the bargain" is still an open question in Minnesota. In *Easton Farmers Elev. Co. v. Chromalloy American Corp.*, 310 Minn. 568, 246 N.W.2d 705 (1976), the court found an express warranty where the seller's statements, if credited by the jury, "constitute express warranties which were central to the negotiated bargain between the parties." *Easton Farmers Elev. Co. v. Chromalloy American Corp.*, 310 Minn. at 575, 246 N.W.2d at 710 (1976). While it may be sufficient that the warranty is central to the negotiated bargain between the parties, the court did not indicate that it is a required condition. In fact, the affirmation, promise, or description need only be a "part" of the basis of the bargain. *See* Uniform Commercial Code, § 2-313, Comment 3. In absence of specific Minnesota authority, the Committee is of the opinion that the term "basis of the bargain" means "a factual statement which plays a part in the agreement for the sale reached by the parties."

It is not necessary for the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee," or that the seller have a specific intent to make a warranty. *See* M.S.A. § 336.2-

313(2). An affirmation of fact or promise is sufficient to create an express warranty. M.S.A. § 336.2-313(1)(a). The Minnesota Supreme Court in *McCormack v. Hankscraft Co.*, 278 Minn. 322, 154 N.W.2d 488 (1967), a pre-Code case, held that "No particular words are required to constitute an express warranty, and the representations made must be interpreted as an ordinary person would understand their meaning, with any doubts resolved in favor of the user." *McCormack v. Hankscraft Co.*, 278 Minn. at 336, 154 N.W.2d at 498 (1967). The representations must be factual, tending to induce the buyer to buy and not mere "puffing" or "sales talk." *McCormack v. Hankscraft Co.*, 278 Minn. at 336, 154 N.W.2d at 498 (1967).

M.S.A. § 336.2-313(1)(a), Minnesota Code Comment provides:

> The affirmation or promise does not have to have a natural tendency to induce the buyer to purchase the goods, and the buyer does not have to rely upon it. Instead, the affirmation or promise must refer to the goods and also become a part of the basis of the bargain.

An affirmation merely of the value of the goods does not create an express warranty. *See* M.S.A. § 336.2-313(2). A statement purporting to be merely the seller's opinion or commendation of the goods does not create an express warranty. *See* M.S.A. § 336.2-313(2). Whether a statement constitutes an opinion, a commendation, or an affirmation of fact will depend on whether "the statements of the seller have in the circumstances and in objective judgment become part of the basis of the bargain." Uniform Commercial Code § 2-313, Comment 8.

M.S.A. § 336.2-105(1) defines "goods" as: "[A]ll things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (article 8) and things in action. 'Goods' also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (section 336.2-107)." M.S.A. § 336.2-105(1).

Research References

West's Key Number Digest
Sales ⚷446

Legal Encyclopedias
C.J.S., Sales § 302

CIVJIG 22.15

EXPRESS WARRANTY BY DESCRIPTION

Proof of express warranty by description

An express warranty by description is created if:

1. The buyer describes the goods to the seller, and
2. The description of the goods becomes part of the basis of the bargain.

Basis of the bargain

A description of goods is part of the "basis of the bargain" if it played a part in the agreement between the seller and the buyer.

Effect of the express warranty by description

With the express warranty by description, the seller warrants to the buyer that the goods will conform to the description.

USE NOTE

This instruction should be used in cases involving a claim that an express warranty was created by a description. For a discussion of Minnesota law relevant to this instruction, *see* the Authorities section of CIVJIG 22.10.

Research References

West's Key Number Digest
Sales ⚷446

Legal Encyclopedias
C.J.S., Sales § 302

CIVJIG 22.20

EXPRESS WARRANTY BY SAMPLE OR MODEL

Proof of warranty by sample or model

An express warranty by sample or model is created if:

1. The seller uses a sample or model of the goods, and

2. The sample or model becomes part of the basis for the bargain.

Basis of the bargain

A sample or model is part of the "basis of the bargain" if it played a part in the agreement between the seller and the buyer.

Existence of an express warranty by sample or model

It must appear that the buyer and seller made the agreement with the understanding that all the goods would be like the sample or model.

The sale is by sample if the quality is identified by reference to a sample or model.

Without this reference, whether a sale is by sample or model is determined by the intent of the parties as shown by:

1. The terms of the contract, and

2. The circumstances around the transaction.

Effect of the express warranty by description

With the express warranty by sample or model, the seller warrants to the buyer that the whole of the goods will conform to the sample or model.

USE NOTE

This instruction should be used in cases involving a claim that an express warranty was created by a sample or model. For a discussion of Minnesota law relevant to this instruction, *see* the Authorities section of CIVJIG 22.10.

Research References

West's Key Number Digest
Sales ⚿446

Legal Encyclopedias
C.J.S., Sales § 302

CIVJIG 22.25

IMPLIED WARRANTY OF MERCHANTABILITY

Definition of "warranty of merchantability"

The law implies that the seller warrants or guarantees that the purchased goods:

[Would pass without objection in the trade under the contract description.]

[In the case of fungible goods, must be of average quality within the description. "Fungible goods" are goods that are interchangeable.]

[Are fit for the ordinary purposes for which the goods are used.]

[Run within the variations of evenness of kind, quality, and quantity permitted by the agreement within each unit and among all units involved.]

[Are adequately contained, packaged, and labeled as required in the agreement.]

[Conform to the promises or stated facts on the container or label.]

USE NOTE

This instruction covers implied warranty of merchantability. It applies once the court determines that the seller is a merchant with respect to goods of the kind being sold. Only the relevant bracketed parts should be used in defining the seller's obligation under the warranty.

This instruction should not be used in cases involving products liability claims covered by the products liability instructions, CIVJIG 75.10ff.

AUTHORITIES

An implied warranty arises from the sales transaction, not from the sales contract. *See Kopet v. Klein*, 275 Minn. 525, 531–532, 148 N.W.2d

385, 390–391 (1967); *Riviera Imports, Inc. v. Anderson Used Cars, Inc.*, 268 Minn. 202, 207, 128 N.W.2d 159, 163 (1964). The implied warranty is imposed by law for the protection of the buyer, and does not depend on the affirmative intentions of the parties to the sales transaction. *See Moosbrugger v. McGraw-Edison Co.*, 284 Minn. 143, 157, 170 N.W.2d 72, 80 (1969), citing *Kopet v. Klein*, 275 Minn. 525, 532, 148 N.W.2d 385, 390–391 (1967); *Bekkevold v. Potts*, 173 Minn. 87, 89, 216 N.W. 790, 791 (1927).

"'Implied' warranties rest so clearly on a common factual situation or set of conditions that no particular language or action is necessary to evidence them and they will arise in such a situation unless unmistakably negated." Uniform Commercial Code § 2-313, Comment 1.

Minnesota has adopted section 2-314 of the Uniform Commercial Code. *See* M.S.A. § 336.2-314:

> (1) Unless excluded or modified (section 336.2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.
>
> (2) Goods to be merchantable must be at least such as
>
> (a) pass without objection in the trade under the contract description; and
>
> (b) in the case of fungible goods, are of fair average quality within the description; and
>
> (c) are fit for the ordinary purposes for which such goods are used; and
>
> (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
>
> (e) are adequately contained, packaged, and labeled as the agreement may require; and
>
> (f) conform to the promises or affirmations of fact made on the container or label if any.
>
> (3) Unless excluded or modified (section 336.2—316) other implied warranties may arise from course of dealing or usage of trade.

M.S.A. § 336.2-314.

Before an implied warranty of merchantability will be found, there must be a contract for the sale of goods, and the seller must be a "merchant with respect to the sale of goods of that kind." M.S.A. § 336.2-314(1).

"A 'sale' consists in the passing of title from the seller to the buyer for a price." * * * M.S.A. § 336.2-106(1). Standards for passage of title are established in M.S.A. § 336.2-401. "Unless otherwise explicitly agreed by the parties, title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods * * * ." M.S.A. § 336.2-401(2). *See also Gross v. Powell*, 288 Minn. 386, 392–393, 181 N.W.2d 113, 117–118 (1970) (where there is no explicit agreement between the parties as to when title will pass, title passes to the buyer no later than the time when unrestricted possession is delivered to the buyer under M.S.A. § 336.2-401).

The sale must be for the sale of goods. The term "goods" is defined in section 336.2-105(1), as:

> all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (article 8) and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty [section 336.2-107].

M.S.A. § 336.2-105(1).

The implied warranty provisions do not apply to the sale of services. *See LeSueur Creamery, Inc. v. Haskon, Inc.*, 660 F.2d 342, 346, n. 6 (8th Cir. 1981), cert. denied, 455 U.S. 1019, 102 S.Ct. 1716, 72 L.Ed.2d 138 (1982). However, where the contract includes both the sale of a product and installation of the product, the implied warranty of merchantability may attach. *See O'Laughlin v. Minnesota Natural Gas Co.*, 253 N.W.2d 826, 830–832 (Minn. 1977), citing *Kopet v. Klein*, 275 Minn. 525, 529, 148 N.W.2d 385, 389 (1967). "The serving for value of food or drink to be consumed either on the premises or elsewhere" is also a sale of goods for purposes of establishing an implied warranty of merchantability. *See* M.S.A. § 336.2-314(1).

> A "merchant" is defined as: a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or their intermediary who by his occupation holds himself out as having such knowledge or skill.

M.S.A. § 336.2-104(1).

Under M.S.A. § 336.2-314(1), the merchant, for implied warranty purposes, must be a merchant with respect to "goods of that kind," meaning goods of the kind that are the subject of the transaction at issue. *See* Uniform Commercial Code § 2-104(1), Comment 2. A person making an isolated sale is not a "merchant" within the meaning of section 2-314; thus, no warranty of merchantability would arise. Uniform Commercial Code § 2-314, Comment 3.

Research References

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CIVJIG 22.30

IMPLIED WARRANTY—COURSE OF DEALING

An implied warranty may arise from (a course of dealing between the parties) (usage of trade).

Definition of a "course of dealing"

[A "course of dealing" is the past pattern of conduct between the parties that fairly establishes a common basis of understanding.

This past course of dealing may be used to interpret what the parties did and said in this transaction.]

Definition of "usage of trade"

[A "usage of trade" is any practice or method of dealing that is regularly used in a place, vocation or trade.

This usage of trade justifies the expectation that it will apply to a transaction.]

USE NOTE

This instruction should be used in cases where the claim is that the implied warranty arose from the course of dealing between the parties or from usage of trade.

AUTHORITIES

M.S.A. § 336.2-314(3) provides that an implied warranty may arise pursuant to a course of dealing or usage of trade.

"Course of dealing" is defined as:

> a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

M.S.A. § 336.1-205(1).

The term "course of dealings" is restricted to "a sequence of previous conduct between the parties." The subsection also makes it clear that the previous conduct must be sufficiently meaningful to establish "a common basis of understanding." Thus, a single act may not be sufficient to constitute a "course of dealing." M.S.A. § 336.1-205, Minnesota Code Comment (1982), citing *Sanders v. Chartrand*, 158 Mo. 352, 362, 59 S.W. 95, 97 (1900). *See also* Uniform Commercial Code § 1-205, Comment 2.

"Usage of trade" is defined as:

> any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question.

M.S.A. § 336.1-205(2).

Although a "usage of trade" must have a "regularity of observance," the test of "custom" has been abandoned. *See* Uniform Commercial Code § 1-205, Comment 5. The definition of "usage of trade" permits the recognition of new usages and usages currently observed by the "great majority of decent dealers." Uniform Commercial Code § 1-205, Comment 5.

"The existence and scope of such a usage are to be proved as facts." M.S.A. § 336.1-205(2). However, if the usage is proved to be embodied in a written trade code or similar writing the interpretation of the writing is for the court. *See* M.S.A. § 336.1-205(2). The usage must be reasonable. The fact of commercial acceptance constitutes a prima facie showing that the usage is reasonable. *See* Uniform Commercial Code § 1-205, Comment 6.

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CIVJIG 22.35

IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE

Definition of "Implied warranty of fitness for a particular purpose"

There is an implied warranty that the goods are fit for a particular purpose if, at the time of the sale:

1. The seller knew or had reason to know the particular purpose the goods were being used for,
2. The seller knew or had reason to know the buyer would rely on the seller's skill and judgment in selecting or providing goods suitable for that purpose, and
3. The buyer relied on the seller's skill or judgment in selecting or providing goods suitable for that purpose.

USE NOTE

This instruction applies in cases involving the implied warranty of fitness for a particular purpose. Note that it is not pre-empted by products liability law.

AUTHORITIES

Minnesota has adopted the implied warranty of fitness provision of section 2-315 of the Uniform Commercial Code. *See* M.S.A. § 336.2-315. Whether an implied warranty of fitness for a particular purpose exists is a question of fact to be determined by the circumstances under which the sale is made. *See* Uniform Commercial Code § 2-315, Comment 1.

Section 2-315 of the Uniform Commercial Code establishes three conditions that must be met before an implied warranty of fitness for a particular purpose will be found:

(1) The seller must have reason to know the buyer's particular purpose.

(2) The seller must have reason to know that the buyer is relying on the seller's skill or judgment to furnish appropriate goods.

(3) The buyer must, in fact, rely upon the seller's skill or judgment.

J. White & R. Summers, Handbook of the Law Under the Uniform Commercial Code § 9-9, at 358.

In order for the warranty to exist, it is not necessary for the buyer to "bring home to the seller actual knowledge of the particular purpose for which the goods are intended or of his reliance on the seller's skill and judgment, if the circumstances are such that the seller has reason to realize the purpose intended or that the reliance exists." Uniform Commercial Code § 2-315, Comment 1; *see* M.S.A. § 336.2-315, Minnesota Code Comment (1982).

The buyer must in fact rely on the seller. *See* Uniform Commercial Code § 2-315, Comment 1. M.S.A. § 336.2-315 omits the trade name exception. However, a trade name can serve as a bar to the creation of an implied warranty of fitness for a particular purpose where the buyer himself is insisting on a particular brand. Because he is not relying on the seller's skill and judgment, no warranty results. However, the mere fact that an article purchased has a particular patent or trade name will not be enough to indicate nonreliance if the article has been recommended by the seller as adequate for the buyer's purposes. *See* Uniform Commercial Code § 2-315, Comment 5. An implied warranty of fitness for a particular purpose is not applicable where a buyer purchases pursuant to specifications of a third party user, and the buyer has been warned of the product's defects or limitations for the proposed intended use. *See Asbestos Products, Inc. v. Ryan Landscape Supply Co.*, 282 Minn. 178, 180–181, 163 N.W.2d 767, 769 (1968). Finally, an implied warranty of fitness for a particular purpose will not be found when, prior to entering into the contract, the buyer had the opportunity or refused the opportunity to examine the goods, and the examination would have revealed the defect to him. *See* M.S.A. § 336.2-315(3)(b).

The implied warranty of fitness for a particular purpose is limited to the sale of goods. *See LeSueur Creamery, Inc. v. Haskon, Inc.*, 660 F.2d 342, 346, n. 6 (8th Cir. 1981), cert. denied, 455 U.S. 1019, 102 S.Ct. 1716, 72 L.Ed.2d 138 (1982).

The term "particular purpose" as used in section 336.2-315 "envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question." Uniform Commercial Code § 2-315, Comment 2.

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CIVJIG 22.40

EXCLUSION OR MODIFICATION OF WARRANTIES

Excluding or modifying warranties

[The implied warranty of merchantability may be excluded or modified if the seller lets the buyer know this at the time of sale.]

[The implied warranty of fitness for a particular purpose may be excluded or modified if the seller gives written notice.

The seller must use the following or similar language in the notice: "There are no warranties that extend beyond the description of the goods."]

[There are no implied warranties when "as is," "with all faults," or other commonly understood language:

1. Calls the buyer's attention to the fact that implied warranties are excluded; and
2. Makes it plain that there is no implied warranty.

This is the case unless the circumstances show otherwise.]

USE NOTE

This instruction is intended for use in cases where there are issues concerning the exclusion or modification of the warranty.

AUTHORITIES

Minnesota has adopted Uniform Commercial Code § 2-316 without change. *See* M.S.A. § 336.2-316. M.S.A. § 336.2-316(2) carries forward the requirement that disclaimers of implied warranties must be very clear and unambiguous. *See* M.S.A. § 336.2-316, Minnesota Code Comment (1982).

Section 336.2-316 requires that a written exclusion or modification of the implied warranty be conspicuous. The issue of whether the exclusion or modification is "conspicuous" is a question for the court. *See*

M.S.A. § 336.1-201(10) ("Whether a term or clause is 'conspicuous' or not is for decision by the court.").

M.S.A. § 325G.18 covers disclaimer of implied warranties in cases involving the sale of consumer sales. A "consumer sale" is defined as "a sale of new goods, or as regards an express warranty, any goods, purchased primarily for personal, family, or household purposes, and not for agricultural or business purposes." M.S.A. § 325G.17(2). Section 325G.18 reads as follows:

> **Subdivision 1.** Unless disclaimed in the manner prescribed in subdivision 2, every consumer sale in this state shall be accompanied by an implied warranty that the goods are merchantable, and, in a consumer sale where the seller has reason to know that the goods are required for a particular purpose and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, an implied warranty of fitness. A seller may, however, limit damages or remedies for breach of implied warranties as provided in chapter 336.
>
> **Subd. 2.** No consumer sale on an "as is" or "with all faults" basis shall be effective to disclaim the implied warranty of merchantability, or, where applicable, the implied warranty of fitness, unless a conspicuous writing clearly informs the buyer, prior to the sale, in simple and concise language each of the following:
>
> (1) The goods are being sold on an "as is" or "with all faults" basis; and
>
> (2) The entire risk as to the quality and performance of the goods is with the buyer.
>
> In event of a consumer sale by means of a mail order catalog, the catalog may contain the required writing in lieu of the requirement of notification prior to the sale.

M.S.A. § 325G.18.

Section 325G.19 covers express warranties. The term "express warranty" is defined as:

> a written statement arising out of a consumer sale pursuant to which the manufacturer, distributor, or retailer undertakes (1) to preserve or maintain the utility or performance of the goods or provide compensation or replacement if there is a failure in utility or performance; or (2) declares that in the event of any sample or model, that the whole of the goods conforms to the sample or model. It is not necessary to the creation of an express warranty that formal words such as "warrant" or "guarantee" be used or that a specific intention to make a warranty be present, but an affirmation

> merely of the value of the goods or a statement purporting to be merely an opinion or commendation of the goods does not create a warranty.

M.S.A. § 325G.17(5).

Section 325G.19 reads as follows:

> **Subdivision 1. Disclaimers.** No express warranty arising out of a consumer sale of new goods shall disclaim implied warranties of merchantability, or, where applicable, of fitness.
>
> **Subd. 2. Honoring of express warranties.** The maker of an express warranty arising out of a consumer sale in this state shall honor an express warranty made by the manufacturer; the distributor shall honor an express warranty made by the distributor; and the retailer seller shall honor an express warranty made by the retail seller.

M.S.A. § 325G.19.

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CIVJIG 22.45

IMPLIED WARRANTY—EXCLUSION OR MODIFICATION BY A COURSE OF DEALING OR USAGE OF TRADE

An implied warranty can be excluded or modified by a (course of dealing) (usage of the trade).

Definition of a "course of dealing"

[A "course of dealing" is the past pattern of conduct between the parties that fairly establishes a common basis of understanding.

This past course of dealing may be used to interpret what the parties did and said in this transaction.]

Definition of "usage of trade"

[A "usage of trade" is any practice or method of dealing that is regularly used in a place, vocation or trade.

This usage of trade justifies the expectation that it will apply to a transaction.]

USE NOTE

This instruction should be used in cases where questions arise concerning warranty modification as a result of a course of dealing between parties or the usage of the trade.

AUTHORITIES

M.S.A. § 336.2-316(3)(c) provides that "an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade." M.S.A. § 336.2-316(3)(c). The terms "course of dealing" and "usage of trade" are defined in M.S.A. § 336.1-205(1), (2).

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CIVJIG 22.50

EXPRESS WARRANTY—BREACH

Breach of express warranty by affirmation or promise

An express warranty by affirmation or promise is breached or broken if the goods do not conform to the affirmation or promise made by the seller.

Breach of express warranty by description

An express warranty by description is breached or broken if the goods do not conform to the description given by the seller.

Breach of express warranty by sample or model

An express warranty by sample or model is breached or broken if the whole of the goods does not conform to the sample or model used by the seller.

USE NOTE

This instruction covers breach of an express warranty. The warranty is breached if it does not conform to the affirmation or promise made by the seller.

Research References

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C.J.S., Sales § 302

CIVJIG 22.55

IMPLIED WARRANTY OF MERCHANTABILITY—BREACH

Breach of implied warranty of merchantability

The implied warranty of merchantability is breached if the purchased goods:

[Would not pass without objection in the trade under the contract description.]

[In the case of fungible goods, these are not of average quality within the description.

["Fungible goods" are goods that are interchangeable.]

[Are not fit for the ordinary purposes for which the goods are used.]

[Do not run within the variations of evenness of kind, quality, and quantity permitted by the agreement within each unit and among all units involved.]

[Are not adequately contained, packaged, and labeled as required in the agreement.]

[Do not conform to the promises or stated facts on the container or label.]

USE NOTE

This instruction is intended for use in cases involving a breach of an implied warranty of merchantability. The appropriate bracketed portion of the instruction should be used, depending on the nature of the claimed breach.

Research References

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CIVJIG 22.60

IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE—BREACH

Breach of an implied warranty of fitness for a particular purpose

> An implied warranty of fitness for a particular purpose is breached if the goods or product are not fit for the particular purpose specified by the buyer at the time of sale.

USE NOTE

This instruction is intended for use in cases involving breach of an implied warranty of fitness for a particular purpose.

Research References

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CIVJIG 22.65

CAUSATION

Definition of "direct cause"

A direct cause is a cause that had a substantial part in bringing about the damage.

USE NOTE

This instruction should be used to define the standard for deciding causation issues in breach of warranty cases. This is the same standard of causation as used in cases involving tort claims. For additional discussion of Minnesota law on proximate cause, *see* the Authorities section of CIVJIG 27.10.

AUTHORITIES

The plaintiff in a breach of warranty case must show not only the breach but also a causal relationship between the breach and the loss sustained. *International Financial Services, Inc. v. Franz*, 534 N.W.2d 261, 265 (1995); *Peterson v. Bendix Home Sys., Inc.*, 318 N.W.2d 50, 52–53 (Minn. 1982); *Heil v. Standard Chemical Mfg. Co.*, 301 Minn. 315, 323–324, 223 N.W.2d 37, 41–42 (Minn. 1974). The breach has to be the proximate cause of the loss. *Nelson v. Wilkins Dodge, Inc.*, 256 N.W.2d 472, 475, n. 2 (1977); *Heil*, 301 Minn. at 323, 223 N.W.2d at 42.

The supreme court has held that "generally no specific defect need be alleged, and a defective condition can be proved by circumstantial evidence." *Nelson*, 256 N.W.2d at 476 (Minn. 1977). The court has also said that circumstantial evidence may be sufficient to show the causal relationship between the product and the injury that followed the use of the product. *Chatfield v. Sherwin-Williams Co.*, 266 N.W.2d 171, 175 (Minn. 1978).

Research References

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CIVJIG 22.70

WARRANTY—DAMAGES

Calculation of warranty damages

A buyer's damages for breach of warranty are the difference between:

1. The value of the goods accepted; and
2. The value of the goods if they had been as warranted.

[The buyer also is entitled to consequential and incidental damages resulting from the seller's breach of warranty.]

[Definition of "consequential damages"

"Consequential damages" include:

1. Losses resulting from general or particular requirements and needs of the buyer if:
   - a. The seller had reason to know about these requirements and needs when the contract was made; and
   - b. The buyer could not reasonably have prevented these damages.
2. Injury to persons or property as a direct result of any breach of warranty.]

[Definition of "incidental damages"

"Incidental damages" include:

1. Reasonable expenses for inspection, receipt, transportation, and care and custody of goods rightfully rejected, and
2. Any commercially reasonable charges, expenses,

> or commissions in connection with minimizing loss. [Include any other reasonable expense resulting from the breach of warranty.]

AUTHORITIES

M.S.A. § 336.2-714 and M.S.A. § 336.2-715 control the buyer's right to recover damages for breach of warranty. Section 336.2-714 reads as follows:

> (1) Where the buyer has accepted goods and given notification (subsection (3) of section 336.2-607) he may recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.
>
> (2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.
>
> (3) In a proper case any incidental and consequential damages under the next section may also be recovered.

M.S.A. § 336.2-714.

Section 336.2-715, covering incidental and consequential damages, reads as follows:

> (1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.
>
> (2) Consequential damages resulting from the seller's breach include:
>
>> (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and
>>
>> (b) injury to person or property proximately resulting from any breach of warranty.

Under the Code, the buyer must have accepted the goods and given notice of the breach of warranty. *See* M.S.A. § 336.2-606 and M.S.A. § 336.2-607. Once the buyer has established both acceptance and notification, the buyer may recover any damages "resulting in the ordinary course of events from the seller's breach determined in any manner which is reasonable." M.S.A. § 336.2-714(1). The three types of recoverable damages under the Code for breach of warranty are general or direct damages, incidental damages, and consequential damages.

Direct damages are those damages that arise out of the breach itself. *See Kleven v. Geigy Agricultural Chemicals*, 303 Minn. 320, 324–325, 227 N.W.2d 566, 569–570 (1975) (defining direct damages in breach of warranty cases arising under the Code). The Minnesota Supreme Court in *Kleven* defined direct damages as those damages that " 'arise naturally—that is, in the usual course of things—from the breach itself * * * .' " *Kleven v. Geigy Agricultural Chemicals*, 303 Minn. 320, 324–325, 227 N.W.2d 566, 569–570 (1975), quoting *Frohreich v. Gammon*, 28 Minn. 476, 481, 11 N.W. 88, 89 (1881). Under this definition, direct damage occurs when " 'a thing sold and warranted is of less value than it would have been if the warranty were true. These damages arise, in the usual course of things, from the breach itself * * * .' " *Kleven v. Geigy Agricultural Chemicals*, 303 Minn. 320, 324–325, 227 N.W.2d 566, 569–570 (1975).

The general measure for direct damages set forth in M.S.A. § 336.2-714(2) has been referred to by the Minnesota Supreme Court as "the time-honored formula to determine the measure of direct damages." *Kleven v. Geigy Agricultural Chemicals*, 303 Minn. 320, 323, 227 N.W.2d 566, 569 (1975). *See generally Alafoss v. Premium Corp. of America, Inc.*, 599 F.2d 232, 237 (8th Cir. 1979); *Soo Line R.R. Co. v. Fruehauf Corp.*, 547 F.2d 1365, 1377–1378 (8th Cir. 1977); *Industrial Graphics, Inc. v. Asahi Corp.*, 485 F.Supp. 793, 801 (D.Minn. 1980); *Vreeman v. Davis*, 348 N.W.2d 756, 757 (Minn. 1984); *Peterson v. Bendix Home Systems, Inc.*, 318 N.W.2d 50, 55 (Minn. 1982); *Cambern v. Hubbling*, 307 Minn. 168, 171–172, 238 N.W.2d 622, 624–625 (1976). The determination of the amount of damages will depend on two factors: (1) the method used to calculate the value of the goods; and (2) whether special circumstances show proximate damages of an amount different from the damages calculated under the general rule.

The general rule in Minnesota is that, in the absence of other evidence, the purchase price is prima facie the value of the product, if it was as warranted. *See Louis DeGidio Oil and Gas Burner Sales and Service, Inc. v. Ace Engineering Co.*, 302 Minn. 19, 28, 225 N.W.2d 217, 223 (1974). The Eighth Circuit has stated that the measure of damages is, generally speaking, the difference between the fair market value of the goods as accepted, and the fair market value they would have had if they had not been deficient. This is the difference or diminution in value approach. *See Soo Line R.R. Co. v. Fruehauf Corp.*, 547 F.2d 1365, 1378 (8th Cir. 1977) (applying Minnesota law).

Three other methods for measuring the difference in value of goods as is and as warranted might be used. The cost of repair approach is used if the repair would restore the goods to the value they would have had if the goods had been as warranted. *See Industrial Graphics, Inc. v. Asahi Corp.*, 485 F.Supp. 793, 802 (D.Minn. 1980); *Cambern v. Hubbling*, 307 Minn. 168, 173, 238 N.W.2d 622, 625 (1976) (looking to treatment costs as a measure of damages where the breach involved the sale of diseased calves).

A second method is the cost of replacement. The measure of damages is the cost of the new goods less the value of the faulty goods. *See* J. White & R. Summers, Handbook of the Law Under the Uniform Commercial Code § 10-2, at 377–378. The repair and/or the replacement cost may not bring the goods to their full value as warranted. In such a case, the buyer may be entitled to recover any difference between the value as warranted, and the value as repaired. *See Soo Line R.R. Co. v. Fruehauf Corp.*, 547 F.2d 1365, 1378 (8th Cir. 1977).

A third method is the value to the purchaser. The Minnesota Supreme Court has held that in an appropriate situation, the value of the goods to the purchaser may be considered in assessing damages. *See generally Louis DeGidio Oil and Gas Burner Sales and Service, Inc. v. Ace Engineering Co.*, 302 Minn. 19, 225 N.W.2d 217 (1974).

M.S.A. § 336.2-714(2) describes the usual method of calculating direct damages in the case of a breach of warranty. However, it is not intended as an exclusive measure. M.S.A. § 336.2-714(2) provides that where "special circumstances show proximate damages of a different amount," other methods of calculating direct damages may be used. *Id.* The Minnesota Code Comments suggest that where special circumstances arise, M.S.A. § 336.2-714(1), providing for the recovery of "the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable," is the appropriate means for calculating damages. *Id. See* M.S.A. § 336.2-714(1), Minnesota Code Comment. *See Alafoss v. Premium Corporation of America, Inc.*, 599 F.2d 232, 237–238 (8th Cir. 1979) (analyzing special circumstances solely under M.S.A. § 336.2-714(2)); *Vreeman v. Davis*, 348 N.W.2d 756 (Minn. 1984); *Cambern v. Hubbling*, 307 Minn. 168, 173, 238 N.W.2d 622, 625 (1976).

Whether or not special circumstances show proximate damages of an amount different from those that would result under the basic damages standard set forth in M.S.A. § 336.2-714(2), depends on the facts of each case.

The incidental damages recoverable under the Code are not defined. Rather, the Code lists the types of expenses that may be recovered as incidental damages. The list provided in M.S.A. § 336.2-715(1) is not intended to be an exhaustive listing of incidental damages; it is intended only to illustrate the types of damages that may be recovered as incidental to the breach. In *Peterson v. Bendix Home Systems, Inc.*, 318 N.W.2d 50, 53 (Minn. 1982), the Minnesota Supreme Court defined incidental damages as "those expenses reasonably incurred in receipt and custody of the product." *Peterson v. Bendix Home Systems, Inc.*, 318 N.W.2d 50, 53 (Minn. 1982). It also includes installation expenses.

The appropriate measure of incidental damages is those losses reasonably incurred in receipt and custody of the goods "to the extent that such losses would not have been incurred except for the breach." *Industrial Graphics, Inc. v. Asahi Corp.*, 485 F.Supp. 793, 808 (D.Minn. 1980) (refusing to grant incidental damages where plaintiff failed to establish to reasonable certainty that claimed losses were incurred as a result of the breach); *see Durfee v. Rod Baxter Imports, Inc.*, 262 N.W.2d 349, 357 (Minn. 1977) (holding repair and maintenance costs were expenses reasonably incurred in caring for the defective automobile and, thus, were recoverable as incidental damages).

M.S.A. § 336.2-714(3) also permits the buyer to recover consequential damages in a proper breach of warranty case. Consequential damages have been defined by the Minnesota Supreme Court as those damages that " 'do not arise directly according to the usual course of things from the breach of the contract itself, but are rather those which are the consequence of special circumstances known to or reasonably supposed to have been contemplated by the parties when the contract was made.' " *Kleven v. Geigy Agricultural Chemicals*, 303 Minn. 320, 324, 227 N.W.2d 566, 569 (1975), quoting *Despatch Oven Co. v. Rauenhorst*, 229 Minn. 436, 445, 40 N.W.2d 73, 79 (1949). The definition is similar to that used in M.S.A. § 336.2-715(2).

In order to recover consequential damages, a buyer must demonstrate that the seller had reason to know of the buyer's general or particular requirements at the time of contracting. *See* M.S.A. § 336.2-715(2)(a); Uniform Commercial Code § 2-715, Comment 3, *Industrial Graphics, Inc. v. Asahi Corp.*, 485 F.Supp. 793, 807 (D.Minn. 1980); *Jacobs v. Rosemount Dodge-Winnebago South*, 310 N.W.2d 71, 78 (Minn. 1981); *Kleven v. Geigy Agricultural Chemicals*, 303 Minn. 320, 325, 227 N.W.2d 566, 570 (1975). Particular needs of the buyer must generally be made known to the seller, while general needs must rarely be made known to charge the seller with knowledge. Uniform Commercial Code § 2-715, Comment 3.

The buyer must demonstrate the extent of his loss. Uniform Commercial Code § 2-715, Comment 4 provides that:

> The burden of proving the extent of loss incurred by way of consequential damages is on the buyer, but the section on liberal administration of remedies rejects any doctrine of certainty which requires almost mathematical precision in the proof of loss. Loss may be determined in any manner which is reasonable under the circumstances.

See Jacobs v. Rosemount Dodge-Winnebago South, 310 N.W.2d 71, 78 (Minn. 1981) (holding the burden is on the buyer to show what the losses are).

The damages must proximately result from the breach of the warranty. "Where the injury involved follows the use of the goods without discovery of the defect causing the damage the question of 'proximate' cause turns on whether it was reasonable for the buyer to use the goods without such inspection as would have revealed the defects." Uniform Commercial Code § 2-715, Comment 5; *see also Bemidji Sales Barn, Inc. v. Chatfield*, 312 Minn. 11, 16, 250 N.W.2d 185, 188 (1977).

The Code does not provide a measure for consequential damages, but the Minnesota Supreme Court has held that "the seller is, under the warranty, chargeable with the loss, as one which may reasonably be supposed to have been in the contemplation of the parties when making the contract." *Kleven v. Geigy Agricultural Chemicals*, 303 Minn. 320, 325, 227 N.W.2d 566, 570 (1975). Any award of consequential damages must be reasonable and not punitive. *See Jacobs v. Rosemount Dodge-Winnebago South*, 310 N.W.2d 71, 78 (Minn. 1981). A buyer seeking to recover consequential damages under the Code must "attempt to minimize his damages in good faith, either by cover or otherwise." Uniform Commercial Code § 2-715, Comment 2; M.S.A. § 336.2-715(2)(a). The Minnesota Supreme Court has applied the doctrine of avoidable consequences to restrict a buyer's recovery of consequential damages. *See Bemidji Sales Barn, Inc. v. Chatfield*, 312 Minn. 11, 16–17, 250 N.W.2d 185, 189 (1977). In that case the court stated that, although the law provides a claimant with a remedy whether he seeks to avoid injurious consequences or not, the amount of damages he is entitled to recover is limited to the extent that he acted reasonably to prevent his own loss. *Bemidji Sales Barn, Inc. v. Chatfield*, 312 Minn. 11, 16–17, 250 N.W.2d 185, 189 (1977). The Minnesota Supreme Court has also held that contributory negligence is a defense to a breach of warranty action for consequential damages, and will result in a reduction of damages in an amount reflecting the extent to which the buyer's conduct caused his own injury. *See Peterson v. Bendix Home Systems, Inc.*, 318 N.W.2d 50, 53–54 (Minn. 1982).

Foreseeable lost profits are recoverable by a buyer as a form of consequential damages. *See Bemidji Sales Barn, Inc. v. Chatfield*, 312 Minn. 11, 15, 250 N.W.2d 185, 188 (1977). To recover lost profits, the buyer must demonstrate that the losses were the result of the seller's breach. *See Bemidji Sales Barn, Inc. v. Chatfield*, at 15, 250 N.W.2d at 188 (1977). However, lost profits in a new business will generally not be recoverable, due to the speculative nature of such damages. The rule applies because there is usually no evidence upon which an award of damages may be based with the requisite degree of certainty. *See Industrial Graphics, Inc. v. Asahi Corp.*, 485 F.Supp. 793, 807 (D.Minn. 1980); *Leoni v. Bemis Co.*, 255 N.W.2d 824, 826 (Minn. 1977).

Limitation of Damages

Under Minnesota law, a contract for the sale of goods can limit a buyer's remedies "to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts." M.S.A. § 336.2-719(1)(a). If that warranty fails of its essential purpose, however, the buyer is entitled to a remedy. Generally, a seller's limited warranty will not fail of its essential purpose as long as the seller repairs each problem as it occurs. *International Financial Services, Inc. v. Franz*, 515 N.W.2d 379, 385 (Minn. Ct. App. 1994), rev. granted, aff'd in part, rev'd in part, 534 N.W.2d 261 (Minn. 1995), *citing Jacobs v. Rosemount Dodge-Winnebago South*, 310 N.W.2d 71, 75 (Minn. 1981); *Durfee v. Rod Baxter Imports, Inc.*, 262 N.W.2d 349, 356 (Minn. 1977). An exclusive remedy clause in a contract for the sale of goods may fail of its essential purpose if circumstances arise to deprive the clause of its meaning or one party of the substantial value of its bargain. *Int'l Fin. Services*, 515 N.W.2d at 385 (Limited "repair or replace" warranty covering photoplotting system used in reproduction of engineering drawings failed of its essential purpose, since buyer was deprived of substantial value of bargain; system was not fit for its ordinary purpose and/or did not conform to seller's affirmations, and, although seller constantly repaired the malfunctions, the number of malfunctions was abnormally high, the system was inoperable during those times, and the system never properly functioned for its intended ordinary purpose.). *See also Minnesota Forest Products, Inc. v. Ligna Machinery, Inc.*, 17 F. Supp. 2d 892, 918–919 (D. Minn. 1998).

In *Lester Bldg. Systems v. Louisiana-Pacific Corp.*, 761 N.W.2d 877 (Minn. 2009), the supreme court noted that Minnesota's version of the Uniform Commercial Code, M.S.A. §§ 336.2-714(3), 715, 721, permits recovery of consequential damages if a seller breaches its warranties or commits fraud. The court set out the general principles governing consequential damages:

> Consequential damages include "any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise." M.S.A. § 336.2-715(2)(a) (2008). Generally, buyers who actually incur out-of-pocket expenses in repairing defective goods may recover repair-cost damages, either as the value of the buyer's direct damages for a breach of warranty or as consequential damages. *See, e.g., IMI Norgren Inc. v. D & D Tooling & Mfg., Inc.*, 247 F.Supp.2d 966, 970–73 (N.D.Ill.2002). In cases involving a reseller of goods, the reseller may also recover damages for future repair costs if the reseller is contractually liable to a third-party for making those repairs. *See Coastal Modular Corp. v. Laminators, Inc.*, 635 F.2d 1102, 1105 (4th Cir.1980). The burden of pleading and proving consequential damages is on the buyer. *Bemidji Sales Barn, Inc. v. Chatfield*, 312 Minn. 11, 15, 250 N.W.2d 185, 188 (1977). Awards of consequential damages must be proven with a reasonable certainty. *Leoni v. Bemis Co.*, 255 N.W.2d 824, 826 (Minn.1977).

761 N.W.2d at 882.

Research References

West's Key Number Digest
Sales ⚷446

Legal Encyclopedias
C.J.S., Sales § 302

SPECIAL VERDICT FORMS

CIVSVF 22.90

WARRANTY ACCIDENT CASES

1. [Did (defendant) make an express warranty with respect to the product in question?]

   [Was there an implied warranty of merchantability with respect to the product?]

   [Was there an implied warranty that the product sold by (defendant) was fit for a particular purpose?]

   ____
   Yes or No

2. *If your answer to Question 1 was "Yes," then answer this question*: Did (defendant) breach (his) (her) (its) warranty to (plaintiff)?

   ____
   Yes or No

3. *If your answer to Question 2 was "Yes," then answer this question*: Was (defendant's) breach of the warranty a direct cause of the (accident) (collision) (event)?

   ____
   Yes or No

4. Was (plaintiff) negligent?

   ____
   Yes or No

5. *If your answer to Question 4 was "Yes," then answer this question*: Was (plaintiff's) negligence a direct cause of the (accident) (collision) (event)?

   ____
   Yes or No

[If your answer to Question 3 was "Yes" and your answer to Question 5 was "Yes," then answer Question 6.]

6. Taking all of the fault that contributed as a direct cause of the (accident) (collision) (event) to be 100%, what percentage do you attribute to:

   (defendant) ________%
   (plaintiff) ________%
   TOTAL
   100%

[You must answer the following question(s), regardless of your answers to any other questions on the special verdict form.]

> [List damage(s) question(s) appropriate to the specific accident case involved—whether a personal injury case, wrongful death case, property damage case, etc.]

USE NOTE

The questions in this Verdict Form correspond with the following jury instructions:

1. CIVJIG 22.10: Express Warranty

   CIVJIG 22.25: Implied Warranty of Merchantability

   CIVJIG 22.35: Implied Warranty of Fitness for a Particular Purpose

2. CIVJIG 22.50: Express Warranty—Breach

   CIVJIG 22.55: Implied Warranty of Merchantability—Breach

   CIVJIG 22.60: Implied Warranty of Fitness for a Particular Purpose—Breach

3. CIVJIG 22.65: Direct Cause

4. CIVJIG 25.10: Negligence and Reasonable Care

5. CIVJIG 22.65: Direct Cause

6. CIVJIG 28.15: Comparative Fault

CIVSVF 22.92

WARRANTY DAMAGES FOR DIFFERENCE IN VALUE, AND CONSEQUENTIAL AND INCIDENTAL DAMAGES

1. [Did (defendant) make an express warranty with respect to the goods in question?]

   [Was there an implied warranty of merchantability with respect to the goods?]

   [Was there an implied warranty that the goods sold by (defendant) were fit for a particular purpose?]

   ____
   Yes or No

2. *If your answer to Question 1 was "Yes," then answer this question*: Did (defendant) breach (his) (her) (its) warranty to (plaintiff)?

   ____
   Yes or No

3. *If your answer to Question 2 was "Yes," then answer this question*: Was (defendant)'s breach of the warranty a direct cause of (plaintiff)'s damages?

   ____
   Yes or No

4. Was (plaintiff) negligent? __________________
   Yes or No

5. *If your answer to Question 4 was "Yes," then answer this question*: Was (plaintiff's) negligence a direct cause of (his) (her) damages?

   ____
   Yes or No

[If your answer to Question 3 was "Yes" and your answer to Question 5 was "Yes," then answer Question 6.]

6. Taking all of the fault that contributed as a direct cause of (plaintiff's) damages to be 100%, what percentage do you attribute to:

   (defendant) ________%

   (plaintiff) ________%
   TOTAL 100%

[Answer Question 7—and its sub-parts—only if your answer to Question 3 was "Yes."]

7. What amount of money will fairly and adequately compensate (plaintiff) for:

a.	The difference between the value of the goods as sold and the value of the goods if they had been as warranted?	$________
b.	Consequential damages?	$________
c.	Incidental damages?	$________

USE NOTE

The questions in this Verdict Form correspond with the following jury instructions:

1. CIVJIG 22.10: Express Warranty

   CIVJIG 22.25: Implied Warranty of Merchantability

   CIVJIG 22.35: Implied Warranty of Fitness for a Particular Purpose

2. CIVJIG 22.50: Express Warranty—Breach

   CIVJIG 22.55: Implied Warranty of Merchantability—Breach

   CIVJIG 22.60: Implied Warranty of Fitness for a Particular Purpose—Breach

3. CIVJIG 22.65: Causation

4. CIVJIG 25.10: Negligence and Reasonable Care

5. CIVJIG 22.60: Causation

6. CIVJIG 28.15: Comparative Fault

7. CIVJIG 22.70: Warranty—Damages

CATEGORY 23

FIDUCIARY DUTY

Table of Instructions

CIVJIG 23.10 Fiduciary Duty

CIVJIG 23.10

FIDUCIARY DUTY

[No recommended instruction].

USE NOTE

Because of the variance in fiduciary relationships, there is no instruction that will cover all cases. Rather, the instruction depends on the nature of the relationship involved in each case.

AUTHORITIES

The Existence of a Fiduciary Relationship

A. Fiduciary Relationships

The first step in determining whether or not there has been a breach of fiduciary duty is to establish the existence of a fiduciary relationship. Whether or not such a relationship exists is a fact question. *Toombs v. Daniels*, 361 N.W.2d 801, 809 (Minn. 1985). The existence of the duty itself is an issue for the court to determine. *See generally H.B. and S.B. Clark v. Whittemore, SLS*, 552 N.W.2d 705, 707 (Minn. 1996); *Larson v. Larson*, 373 N.W.2d 287, 289 (Minn. 1985).

Under Minnesota common law, a fiduciary relationship exists when one party places its trust and confidence in the other. *Gibson v. Coldwell Banker Burnet*, 659 N.W.2d 782, 788 (Minn. Ct. App. 2003). A fiduciary relationship may also be found to exist when evidence indicates that one of the parties enjoyed superior or excessive influence over the other party. *See Minnesota Timber Producers v. Amer. Mut. Ins.*, 766 F.2d 1261, 1268 (8th Cir. 1985); *Flynn v. American Home Corp.*, 627 N.W.2d 342 (Minn. Ct. App. 2001). In addition to influence, courts have found a fiduciary relationship when the party relied upon has superior knowledge. *Norwest Bank Hastings v. Clapp*, 394 N.W.2d 176 (Minn. Ct. App. 1986). Disparity in business experience and invited confidence can also be a basis for a finding of a fiduciary relationship. *Cherne Contracting Corp. v. Wausau Ins. Co.*, 572 N.W.2d 339, 342 (Minn. Ct. App. 1998); *May v. First Nat'l Bank of Grand Forks, North Dakota*, 427 N.W.2d 285, 290 (Minn. Ct. App. 1988) (Quoting *Murphy v. Country House, Inc.*, 307 Minn. 344, 240 N.W.2d 507, 512 (1976). The *Murphy* court also noted that the existence of a fiduciary relationship can depend on whether the alleged fiduciary knew of the dependent party's ignorance as to the legal effect of a stock transaction or whether the fiduciary should have reasonably known that the other would not have understood any disclosure.). *Murphy v. Country House, Inc.*, 307 Minn. 344, 240 N.W.2d 507, 512 (1976).

In *Carlson v. Sala Architects, Inc.*, 732 N.W.2d 324 (Minn. Ct. App. 2007), the Minnesota Court of Appeals considered the issue of whether a fiduciary relationship existed between an architect and client. The court noted that "[a] fiduciary relationship is characterized by a 'fiduciary' who enjoys a superior position in terms of knowledge and authority and in whom the other party places a high level of trust and confidence." *Id.* at 330–331, citing *Toombs v. Daniels*, 361 N.W.2d 801, 809 (Minn. 1985). The court also said that an ordinary business relationship may involve reliance on a professional, and that in such a relationship a certain degree of trust and a duty of good faith is involved, yet the relationship is not classified as fiduciary. 732 N.W.2d at 331. The court compared *D.A.B. v. Brown*, 570 N.W.2d 168, 171 (Minn. Ct. App. 1997), in which it had previously held that a physician-patient relationship is not classified as fiduciary. Absent binding authority to the contrary, the court held that the architect-client relationship is not a fiduciary relationship. While holding that there was no *per se* fiduciary relationship, the court also noted that the facts of the case could nonetheless establish the existence of such a relationship, and that on the facts of the case it was inappropriate for the trial court to have granted summary judgment on the issue.

In *Swenson v. Bender*, 764 N.W.2d 596 (Minn. Ct. App. 2009), the court of appeals held that the relationship between an academic advisor and doctoral candidate did not create a fiduciary relationship *per se*.

Minnesota courts have found the existence of a fiduciary relationship in the following areas: attorney/client, partners in a partnership, principal/agent, insurer/insured, real estate broker/client, husband/wife, guardian/ward, and trustee/beneficiary. In addition, in the corporate context, courts have acknowledged the existence of a fiduciary relationship between directors and officers to the shareholders, and shareholders to other shareholders; this is prescribed by statute for both for-profit and non-profit organizations.

1. Attorney/Client

For a plaintiff to prove a prima facie case against an attorney for a breach of a fiduciary duty, the plaintiff must prove (1) the existence of the attorney-client relationship between the plaintiff and defendant and (2) a transaction involving the plaintiff and defendant from which the defendant derived a benefit. 25 Causes of Action § 1 (Westlaw 2004). This coincides with Minnesota law in the area of legal malpractice claims; the Minnesota Court of Appeals has held that a breach of fiduciary claim is sustained on the same elements as a legal malpractice claim. *Padco, Inc. v. Kinney & Lange*, 444 N.W.2d 889, 891 (Minn. Ct. App. 1989).

An attorney-client relationship gives rise to a fiduciary relationship. *STAR Centers, Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002); *Gramling v. Mem'l Blood Ctrs.*, 601 N.W.2d 457, 459 (Minn. Ct. App. 1999) (stating that both a duty of care and a fiduciary duty arise from the creation of an attorney-client relationship, which in Minnesota may be formed under either tort or contract.); *see also John S. Schomburg, P.A. v. Garthe*, 2001 WL 537056, at *3 (Minn. Ct. App. 2001) (stating that it is undisputed that the parties were involved in a fiduciary relationship as attorney and client); *Webb v. Berman*, 1997 WL 53024, at *1 (Minn. Ct. App. 1997) (acknowledging the confidential and fiduciary nature of an attorney-client relationship).

Fiduciary duties owed by attorneys consist of representing the client with undivided loyalty, preserving the client's confidences, and to disclose any material matters bearing upon the representation of these obligations. *STAR Centers, Inc.*, 644 N.W.2d at 77. The duty to disclose requires that an attorney communicate to his client whatever information he obtains that may affect the interests of his client in respect to the matters entrusted to him. *STAR Centers, Inc.*, 644 N.W.2d at 77 (quoting *Selover v. Hedwall*, 149 Minn. 302, 306, 184 N.W. 180, 181 (1921)).

As in a legal malpractice relationship, whether or not the attorney/client relationship itself exists is a question of fact for the jury. *Admiral Merchants Motor Freight, Inc. v. O'Connor & Hannan*, 494 N.W.2d 261, 265 (Minn. 1992). However, the existence of the duty itself is an issue for the court to determine. *See generally H.B. and S.B. Clark v. Whittemore, SLS*, 552 N.W.2d 705, 707 (Minn. 1996). In the case of the duties owed by an attorney to his or her client, this will not be an issue as there is a well-established body of law which holds that attorneys must represent their clients with undivided loyalty, must preserve client confidences, and a duty to disclose material information bearing on their representation of their clients. *STAR Centers, Inc.*, 644 N.W.2d at 77.

In *Thomas B. Olson & Associates, P.A. v. Leffert, Jay & Polglaze, P.A.*, 756 N.W.2d 907 (Minn. Ct. App. 2008), rev. denied (Minn. Jan. 20, 2009), the court of appeals noted the general reluctance of Minnesota courts to impose a duty upon attorneys to their client's adversary:

> [Imposing] such a duty would "necessarily conflict" with the at-

> torney's duty to the client. *L & H Airco, Inc. v. Rapistan Corp.*, 446 N.W.2d 372, 378–79 (Minn.1989) (holding that attorney did not have duty to non-clients to investigate arbitrator's impartiality because of duty to "zealously represent [his] client and resolve all doubts in favor of the client"); *Marker v. Greenberg*, 313 N.W.2d 4, 5–6 (Minn.1981) (holding that attorney who drafted deed conveying real property in joint tenancy did not owe fiduciary duty to surviving tenant who was not client); *see also McIntosh County Bank v. Dorsey & Whitney, LLP*, 745 N.W.2d 538, 547 (Minn.2008) (holding that attorney does not owe fiduciary duty to non-client who is not "direct and intended beneficiary" of attorney-client relationship).

A fiduciary duty may exist, however, if a trust is created for the benefit of a third party, in which case an attorney may have a fiduciary duty to both a client and non-client. 756 N.W.2d at 914. The court noted on *Olson* that the Minnesota Rules of Professional Conduct specifically contemplate that an attorney may have a fiduciary duty to both a client and a non-client under those circumstances. The court noted that the applicable rule of professional conduct states that if a third party asserts a right to funds in an attorney's trust account, the funds should not be withdrawn until resolution of the dispute:

> If the right of the lawyer or law firm to receive funds from the account is disputed by the client or *third person claiming entitlement to the funds*, the disputed portion shall not be withdrawn until the dispute is finally resolved. If the right of the lawyer or law firm to receive funds from the account is disputed within a reasonable time after the funds have been withdrawn, the disputed portion must be restored to the account until the dispute is resolved.

Minn. R. Prof. Conduct 1.15(b) (emphasis the court's). The court noted that comment 4 to Rule 1.15(b) is more explicit:

> Paragraph (b) . . . recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved.

2. Partnerships

A partner owes fiduciary duty to copartners, and whether or not such a relationship exists is a question for the jury. *Midland Nat. Bank of Minneapolis v. Perranoski*, 299 N.W.2d 404, 413 (Minn. 1980); *Appletree Square I Limited Partnership v. Investmark, Inc.*, 494 N.W.2d 889, 892 (Minn. Ct. App. 1993). The relationship of partners is fiduciary and partners are held to high standards of integrity in their dealings with each other. *Appletree*, 494 N.W.2d at 892; *see also Lipinski v. Lipinski*, 227 Minn. 511, 512, 35 N.W.2d 708, 709 (1949) (stating that the relationship between partners or joint entrepreneurs is one of mutual trust and confidence, and the law imposes upon them the highest standard of integrity and good faith in their dealings with each other).

Duties from one partner to another include the duty to disclose material facts to each other. *Appletree*, 494 N.W.2d at 892. Where a fiduciary relationship exists, silence may constitute fraud. *Appletree*, 494 N.W.2d at 892 (citing *Toombs v. Daniels*, 361 N.W.2d 801, 809 (Minn. 1985)). In a situation where one partner seeks to benefit himself at the expense of the firm, that partner is required to show that "his conduct will bear to be tried by the highest standard of honor." *Kitzman v. Postier & Kruger Co. Inc.*, 204 Minn. 343, 346, 283 N.W. 542, 543 (1939).

M.S.A. § 322A.28(2) (2004) outlines the statutory duty to disclose. It states that each partner (or limited partner in this case), has a right "upon reasonable demand" to all true and full information regarding the state of the business and the financial condition of the limited partnership . . . and all other information regarding the affairs of the limited partnership. M.S.A. § 322A.28(2)(i–iii) (2004). In *Appletree*, the court of appeals stated that the trial court erred when it found that because the partners claiming the breach did not ask for certain information regarding asbestos contamination, there was no breach when the other partner failed to disclose information about asbestos which it knew about. *Appletree*, 494 N.W.2d at 892. The court said that just because the statute addressed the narrow duty of partners to respond to requests for information, they were not absolved of their common law duty to disclose all material facts. *Appletree*, 494 N.W.2d at 892. The questions of fact in this case would be whether or not there was a partnership, and then whether or not the person failing to disclose material information knew of that information or not. *Appletree*, 494 N.W.2d at 393.

In *Midland*, the court said that where those alleging the breach of fiduciary duty were well-educated people with experience in business failed to read a legally binding document wherein they agreed to purchase a share in a partnership for "tax-shelter" purposes, no fiduciary relationship existed between them and the seller. 299 N.W.2d at 413. The court noted that a fiduciary's duty must be defined with reference to the experience and intelligence of the person to whom the duty is owed. *Midland*, 299 N.W.2d at 413.

Partners are free to vary many aspects of their relationship by contract, but they cannot destroy its fiduciary character. M.S.A. § 323.20; *Triple Five of Minnesota, Inc. v. Simon*, 280 F.Supp.2d 895, 901–02 (D.Minn. 2003) (citing *Appletree Square I Ltd. Partnership v. Investmark, Inc.*, 494 N.W.2d 889, 893 (Minn. Ct. App. 1993)). Thus, even if the parties try and limit their duties to one another in writing, there are certain common-law fiduciary duties that partners in a partnership must adhere to. *Triple Five*, 280 F.Supp.2d at 901; *Apple-*

tree, 494 N.W.2d at 892. This includes a duty to disclose. *See* M.S.A. § 323.19.

3. Principal/Agent

In situations where a court is attempting to find the existence of a fiduciary relationship, agency principles are preferred by the courts. *PMH Properties v. Nichols*, 263 N.W.2d 799, 801 (Minn. 1978). The *PMH* court stated that if one can be labeled an agent of a principle, it would be impossible to characterize their dealings as arms-length, and the agent would owe a principle a fiduciary duty of full disclosure. *PMH Properties v. Nichols*, 263 N.W.2d 799, 801 (Minn. 1978). There is a long line of cases holding that agents owe their principles the "utmost fidelity." *See, e.g., In re Estate of Nordorf*, 364 N.W.2d 877, 879 (Minn. Ct. App. 1985) (stating that one acting in a fiduciary capacity must exercise utmost fidelity toward the principal and owes the principal a duty of full disclosure). *Carlson v. Carlson*, 363 N.W.2d 803, 805 (Minn. Ct. App. 1985) (also stating that one acting in fiduciary capacity must exercise utmost fidelity toward the principal and owes the principal a duty of full disclosure).

Agents under Minnesota law must act solely for benefit of his or her principal in all matters connected with agency. *Dahl v. Charles Schwab & Co., Inc.*, 545 N.W.2d 918, 925 (Minn. 1996); *Doyen v. Bauer*, 211 Minn. 140, 145, 300 N.W. 451, 454 (1941). This duty has been characterized as a duty of loyalty. *See Doyen*, 211 Minn. at 145, 300 N.W. at 454. An agent is therefore "not permitted to put himself in an antagonistic relation to his principal," and must exercise the utmost good faith, which then means he has a duty of full disclosure. *Doyen*, 211 Minn. at 145, 300 N.W. at 454. Profits made during the course of agency belong to principal whether they are fruits of performance or violation of agent's duty, and an agent may not profit from the relationship nor engage in self-dealing without principal's consent after full disclosure of facts which might affect principal's decision. *Dahl*, 545 N.W.2d at 925; *Doyen*, 211 Minn. at 145, 300 N.W. at 454.

That is not to say that an agent can never act for his own benefit in relation to the subject to the agency, but he or she must do so only with the full consent of the principal. *Carlson v. Carlson*, 363 N.W.2d 803, 805 (Minn.Ct. App. 1985). If there is a transaction between fiduciaries, and the party in which confidence has been reposed has obtained benefits without consideration (or for inadequate consideration, there is a presumption of fraud that can be rebutted by showing that there was full disclosure and consent. *Carlson*, 363 N.W.2d at 806.

4. Real Estate Broker/Client

Minnesota courts have found that a fiduciary relationship exists between a real estate broker and a client. *See Estate of Sivert v. Engbarth*, 271 Minn. 152, 164–65, 135 N.W.2d 205, 212–13 (1965). In *White v. Boucher*, 322 N.W.2d 560, 564 (Minn. 1982), the Minnesota Supreme

Court held that once a real estate broker executes a listing agreement, a broker becomes the agent of the seller and thus becomes subject to the general rules governing the principal-agent relationship. In this context, the broker owes the utmost good faith and loyalty to his principal. *White v. Boucher*, 322 N.W.2d at 564. Included in this duty is the broker's duty to communicate to the seller "all facts of which he has knowledge which might affect the principal's rights or interests." *White v. Boucher*, 322 N.W.2d at 564 (quoting *Magee v. Odden*, 220 Minn. 498, 503, 20 N.W.2d 87, 90 (1945)). More specifically, a real estate broker has a duty to make full disclosure of the financial status of a prospective purchaser. *White v. Boucher*, 322 N.W.2d at 564–65.

The court in *Boucher* held that the real estate broker did not breach fiduciary duty owed to vendors by also acting as agent of purchasers and by failing to disclose an alleged double agency, because there was no dual agency. *White v. Boucher*, 322 N.W.2d at 567. Even though the broker made a determination as to what type of home purchasers could afford, showed purchasers several pieces of property, and helped the purchasers prepare an offer, because the broker's agents did not act "at the purchasers' direction," nor was the agent "subject to [the purchasers] control," that there was no double agency. *White v. Boucher*, 322 N.W.2d at 567. Therefore the broker only owed the sellers, not the buyers, a fiduciary duty in that case.

In *Gibson v. Coldwell Banker Burnett*, the court held that a real estate agent owed his principal a fiduciary duty by stating that "[a] fiduciary relationship exists when one party places its trust and confidence in the other." 659 N.W.2d 782, 788 (Minn. Ct. App. 2003) (citing *Target Stores, Inc. v. Twin Plaza Co.*, 277 Minn. 481, 153 N.W.2d 832, 844 (1967)). In that case, the plaintiffs had also signed a real estate contract stating that "[s]eller's broker owes to the Seller the fiduciary duties described below." *Gibson v. Coldwell Banker Burnett*, 659 N.W.2d at 785. The duties were loyalty, obedience, disclosure, confidentiality, reasonable care, and accounting. *Gibson v. Coldwell Banker Burnett*, 659 N.W.2d at 785. The court did not rely on the contract language, however, instead choosing to define the relationship as arising from the more vague, common law definition.

5. Insurer/Insured

Minnesota courts have held that an "insurer owes a fiduciary duty to the insured to represent his or her best interests and to defend and indemnify." *Kissoondath v. U.S. Fire Ins. Co.*, 620 N.W.2d 909, 914–15 (Minn. Ct. App. 2001) (quoting *Short v. Dairyland Ins. Co.*, 334 N.W.2d 384, 387 (Minn. 1983). An insurer's right to control the negotiations for settlement must be subordinated to the purpose of the insurance contract, which is to defend and indemnify the insured within the limits of the insurance contract. *Kissoondath v. U.S. Fire Ins. Co.*, 620 N.W.2d at 915. The *Kissoondath* court explained that a fiduciary duty arises because there is unequal bargaining power between an insurer and its insured. *Kissoondath v. U.S. Fire Ins. Co.*, 620 N.W.2d at 915 (quoting *Arnold v. Nat'l County Mut. Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex. 1987)). It went on to say that the nature of insurance contracts would allow unscrupulous insurers to take advantage of their insureds' misfortunes in bargaining for settlement or resolution of claims if no fiduciary duty were imposed. *Kissoondath v. U.S. Fire Ins. Co.*, 620 N.W.2d at 915.

The duty from an insurer to an insured is measured by the standard of "good faith." *Kissoondath v. U.S. Fire Ins. Co.*, 620 N.W.2d at 915. To exercise good faith, an insurer must view a situation as if there were no policy limits applicable to the claim, and to give equal consideration to the financial exposure of the insured. *Kissoondath v. U.S. Fire Ins. Co.*, 620 N.W.2d at 915. An insurer can breach its duty when an insured is clearly liable, and the insurer fails to communicate a settlement offer to the insured. *See Short v. Dairyland Ins. Co.*, 334 N.W.2d 384, 389 (Minn. 1983). Failing to properly evaluate the value of a claim can also constitute a breach. *Kissoondath*, 620 N.W.2d at 920; *Boerger v. Amer. Gen. Ins. Co.*, 257 Minn. 72, 76–77, 257 Minn. 72, 100 N.W.2d 133, 136–37 (1959).

In a case involving a business and its workers' compensation insurer, the court of appeals affirmed a trial court decision holding that an insured's relationship with its workers' compensation insurer was based solely on an insurance contract between two business enterprises and did not rise to the level of a fiduciary relationship. *Cherne v. Contracting Corp. v. Wausau Ins. Cos.*, 572 N.W.2d 339, 342 (Minn. Ct. App. 2001). Cherne, the plaintiff in this case, claimed that because Wausau had used Cherne's funds to handle claims, and because Cherne relied on Wausau's attorneys who had defended Cherne as a client, that there was a fiduciary relationship. *Cherne v. Contracting Corp. v. Wausau Ins. Cos.*, 572 N.W.2d at 343. The court explained that the relationship created by an insurance contract necessarily involves competing interests which often generate litigation between the insurer and insured. *Cherne v. Contracting Corp. v. Wausau Ins. Cos.*, 572 N.W.2d at 343. As such, the court said that the plaintiff would have to show that it had actually placed trust and confidence in its workers' comp insurer order to show that there was a fiduciary relationship. *Cherne v. Contracting Corp. v. Wausau Ins. Cos.*, 572 N.W.2d at 343.

In the situation where an insurance agent is holding and collecting premiums on behalf of an insurer, the law does not presume that insurance agents hold premiums for insurers in a fiduciary capacity. *General Cas. Co. of Wisconsin v. Mid-Continent Agencies, Inc.*, 485 N.W.2d 147, 150–51 (Minn. Ct. App. 1992) (stating the nature of the relationship is more of a debtor-creditor relationship).

6. Guardian/Ward

In *Ashton v. Thompson*, the supreme court stated that a guardian stands in a fiduciary relation to his or her ward. 32 Minn. 25, 42, 18 N.W. 918, 923 (1884). However, in that case, the guardian who breached her duty to her ward was also the ward's parent. The court said that as a parent, one stands in a confidential relationship with one's child, and as a guardian, one stands in a fiduciary relationship. *Ashton v. Thompson*, 32 Minn. 25, 42, 18 N.W. 918, 923 (1884). The court also said the child/ward can recover for breach of any duties arising from these relationships. In this case, a daughter inherited a significant amount of real and personal property from her father when he died. *Ashton v. Thompson*, 32 Minn. at 35, 18 N.W. at 918. She promptly gave all the property to her mother and received no consideration. *Ashton v. Thompson*, 32 Minn. 25, 42, 18 N.W. 918, 923 (1884). When she came to understand that she had essentially divested herself of her entire estate and would be dependent on her mother for support, she decided she wanted some or all of the property back under her control; her mother did not want to comply. *Ashton v. Thompson*, 32 Minn. at 35, 18 N.W. at 920. The court said that the mother failed to rebut the presumption of undue influence by showing that "transaction was a 'righteous' one, that it was a free act of donor, accomplished with full knowledge of her rights and of all material facts . . . ." *Ashton v. Thompson*, 32 Minn. at 35, 18 N.W. at 923. The court then went on to say that the agreement whereby daughter gave her mother her inheritance seemed not to be for the advantage of the daughter, but rather for the mother's own benefit. *Ashton v. Thompson*, 32 Minn. at 35, 18 N.W. at 923. As such, the agreement was invalid. *Ashton v. Thompson*, 32 Minn. at 35, 18 N.W. at 923.

The rule for both parents and guardians, then, is that there is a rebuttable presumption that a transaction is invalid where the parent or guardian benefits from that transaction, and where the child or ward receives no benefit or consideration in return. To rebut that presumption, the guardian or parent must show that it was a "free act" on the part of the child/ward, and moreover, the child/ward executed the agreement with full knowledge of her rights and material facts.

7. Husband/Wife

The Minnesota Supreme Court has held that a relationship between husband and wife is confidential in its nature and fiduciary in its character. *Knox v. Knox*, 222 Minn. 477, 483, 25 N.W.2d 225, 229 (1946); *Crowley v. Crowley*, 219 Minn. 341, 18 N.W.2d 40) (1945).

In *Crowley*, a woman had promised to take care of an aging and ailing man, and a marriage ensued. 219 Minn. at 345–46, 25 N.W.2d at 43. She then convinced him to transfer his home into joint tenancy, and transferred some personal funds into her name. *Crowley*, 219 Minn. at 345–46, 25 N.W.2d at 43. She then absconded with his liquid assets. *Crowley*, 219 Minn. at 345–46, 25 N.W.2d at 43. The supreme court held that she breached a duty of good faith arising from her fiduciary relationship to the plaintiff. *Crowley,* 219 Minn. at 345–46, 25 N.W.2d at 45. The court said the relationship existed because of the trust he reposed in her as his intended wife and caretaker. *Crowley*, 219 Minn. at 345–46, 25 N.W.2d at 43. Because she obtained title to his property in bad faith, the court said, equity would not allow her to keep the property and a constructive trust was established. *Crowley,* 219 Minn. at 345–46, 25 N.W.2d at 43. The holding in this case seems to rest primarily on the fact that the plaintiff believed that this woman would take care of him, and it was under that assumption that he gave her his property. *Crowley,* 219 Minn. at 345–46, 25 N.W.2d at 43. It's hard to say, then, whether all husbands and wives are fiduciaries or whether simply those that trust each other are.

8. Physician/Patient

There is no fiduciary relationship between a physician and a patient. *McDeid v. Michael O'Keefe*, 2003 WL 21525128 (Minn. Ct. App. 2003). Minnesota courts have declined to re-frame medical malpractice claims in terms of a breach of a fiduciary duty on the part of the physician. *See D.A.B. v. Brown*, 570 N.W.2d 168, 171 (Minn. Ct. App. 1997). There is no Minnesota case law holding that physicians or hospital staff members have a fiduciary duty towards their patients. *McDeid v. Michael O'Keefe*, 2003 WL 21525128 (Minn. Ct. App. 2003).

9. Employer/Employee

In general, "all employees, to a lesser or greater extent, have a fiduciary relationship to their employers, . . . with a duty to act in the interests of the employer and not as an adversary." *State by McClure v. Sports and Health Club, Inc.*, 370 N.W.2d 844, 858 (Minn. 1985) (citing Restatement (Second) of Agency §§ 1, 2, 13 (1957)). The court has held that a claim upon which relief can be granted is recognized in limited circumstances: (1) soliciting business of the employer prior to leaving the employment relationship, (2) disclosing or misappropriating information that the employer has treated as a secret, and (3) engaging in serious misconduct such as embezzlement or referring customers to a competitor. *Electro-Craft Corp. v. Controlled Motion, Inc.*, 332 N.W.2d 890, 903 (Minn. 1983) (misappropriating information the employer has treated as a secret violates employee's duty of confidentiality); *Sanitary Farm Dairies, Inc. v. Wolf*, 261 Minn. 166, 175, 112 N.W.2d 42, 48 (1961) (soliciting business of an employer prior to leaving employment breaches employee's duty of loyalty); *Hlubeck v. Beeler*, 214 Minn. 484, 489, 9 N.W.2d 252, 254 (1943) (embezzlement breaches the duty to serve an employer "faithfully and honestly"); *St. Cloud Aviation, Inc. v. Hubbell*, 356 N.W.2d 749, 751 (Minn. Ct. App. 1984) (referring a customer to a competitor breaches fiduciary duty of salesperson).

Fiduciary Duty in the Corporate Context

Fiduciary duty in the corporate context is comprised primarily of two components: a duty of loyalty and a duty of care. As in other areas of fiduciary duty, the existence of the duty is a matter of law (statutory, in fact), while the breach is a question of fact.

The existence of a fiduciary duty in the corporate context has been defined by statute. M.S.A. § 302A.251 defines the duty for directors. M.S.A. § 302A.361 outlines primarily the same standard of conduct but applies to corporate officers. M.S.A. § 317A.361 outlines the duty in the non-profit setting. M.S.A. § 302A.255 deals specifically with the duty to disclose a director's conflict of interest.

A. The Existence of the Duty

M.S.A. § 302A.251, subd. 1 states that:

> A director shall discharge the duties of the position of director in good faith, in a manner the director reasonably believes to be in the best interests of the corporation, and with the care an ordinarily prudent person in a like position would exercise under similar circumstances.

The statute goes on to say that "[a]ny person who so performs those duties is not liable by reason of being or having been a director of the corporation." M.S.A. § 302A.251, subd. 1. In considering what constitutes the best interests of the corporation, a director may consider the interests of the corporation's employees, customers, suppliers and creditors, the state and national economy, community and societal considerations and the long-term as well as the short-term interests of the corporation and its shareholders. Matheson and Garun, 18 Minnesota Practice: Corporation Law and Practice § 3.30 (citing M.S.A. § 302A.251, subd. 5).

While not specifically mentioned in a statute, promoters and incorporators must meet a similar standard as that which is laid out for directors. *See Earle R. Hanson & Associates v. Farmers Co-op Creamery Co.*, 403 F.2d 65, 70 (8th Cir. 1968). The comment to the statute implies that the reason that duties on the part of players other than directors and officers is not explicitly defined by statute is so that courts can be flexible in making case-by-case determinations. M.S.A. § 302A.251, subd. 1, Special Comment. As such, courts have discretion in determining who owes the duty. For example, the duty of a fiduciary can be dependent on the person to whom the duty is owed. The Minnesota Supreme Court held that the extent of the fiduciary duty one may owe must be defined in light of the experience and intelligence of the person or people to whom that duty is owed. *See Midland Nat. Bank of Minneapolis v. Perranoski*, 299 N.W.2d 404, 414 (Minn. 1980) (holding that two well-educated people, familiar with the business world could not succeed on a breach of fiduciary duty claim where they signed, but failed to read, a limited partnership agreement). The Minnesota Supreme Court has also said that the existence of a fiduciary relationship can depend on whether the one owing the duty (in this particular case, a duty to disclose) knew of the dependant party's ignorance as to the legal effect of a stock transaction or whether the fiduciary should have reasonably known that the other would not have understood any disclosure. *Murphy v. Country House, Inc.*, 307 Minn. 344, 240 N.W.2d 507, 512 (1976) (stating that disparity of business experience and invited confidence can be legally sufficient basis for finding a fiduciary relationship). Two parties to an arms' length transaction are generally not held to owe one another a fiduciary relationship. *See Minnesota Timber Prod. Assoc. Inc., v. Amer. Mut. Ins. Co. of Boston*, 766 F.2d 1261, 1267 (8th Cir. 1985) (holding that where an insurer and timber producers association entered into a contract for group worker compensation insurance, no fiduciary relationship existed). Nor does one exist between a manufacturer and distributor when the manufacturer had no direct control over the distributor's operations and distributor was independently owned business. *W.K.T. Distributing Co. v. Sharp Electronics Corp.*, 746 F.2d 1333, 1336–37 (8th Cir. 1984).

B. Duty of Loyalty and Duty of Care

The standard of conduct laid out in M.S.A. § 302A.251 (and, consequently, § 302A.361) has two fundamental elements: first, a "duty of loyalty" and second, a "duty of care." *See* Matheson and Garon, 18 Minnesota Practice: Corporation Law and Practice § 3.30; *Shepherd of the Valley Lutheran Church of Hastings*, 626 N.W.2d 436, 442 (Minn. Ct. App. 2001) (citing M.S.A. § 317A.361 (2000) which governs nonprofit entities, and *Miller v. Miller*, 301 Minn. 207, 219, 222 N.W.2d 71, 78 (1974)). A Minnesota court of appeals case has also referred to the "triad" of fiduciary duty as being good faith, loyalty and due care. *Potter v. Pohlad*, 560 N.W.2d 389, 392 (Minn. Ct. App. 1997) (quoting *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993), modified, 636 A.2d 956 (Del. 1994)). Another oft-cited case in this context, *Miller v. Miller*, refers to a corporate officer's "fiduciary duties of loyalty, good faith, and fair dealing." 301 Minn. 207, 224, 222 N.W.2d 71, 81 (Minn. 1974) (stating that a corporate fiduciary will be liable for appropriating a corporate business opportunity if the court determines that the opportunity is in the corporation's "line of business," and whether by acquiring such an opportunity a corporate officer violated his fiduciary duties of loyalty, good faith and fair dealing toward the corporation). For the purposes of jury instructions, it would seem that the duty of good faith is incorporated into the duty of loyalty.

1. The Duty of Loyalty

Minnesota courts have long held that directors and officers owe stockholders an active duty of honesty and good faith while transacting the business of the corporation and their own dealings with it. *See Keough v. St. Paul Milk Co.*, 205 Minn. 96, 121, 285 N.W. 809, 823 (Minn. 1939); *Young v. Blandin*, 215 Minn. 111, 9 N.W.2d 313 (Minn. 1943) (stating that when a president is acting as a liquidator of a corporation's affairs, he stood in a position of fiduciary toward the corporation and other stockholders).

Good faith is defined in M.S.A. § 302.011 as "honesty in fact in the conduct of the act or transaction concerned." *Westgor v. Grimm*, 318 N.W.2d 56, 58 (Minn. 1982); *McMenomy v. Ryden*, 276 Minn. 55, 63, 148 N.W.2d 804, 809 (Minn. 1967) (stating that under Minnesota common law and statutes, the liability of director and officer of corporation to shareholder is predicated on breach of fiduciary relationship which involves mainly a lack of good faith (interpreting predecessor statute M.S.A. § 330.31)); Matheson and Garon, 18 Minnesota Practice: Corporation Law and Practice § 3.30.

The *Miller* court further explains that a finding of bad faith is not necessarily essential to impose liability upon a corporate fiduciary for exploitation of corporate opportunity, nor does good faith alone, apart from his fiduciary duty requiring loyalty and fair dealing toward corporation absolve him from liability. Id. The 8th Circuit has also acknowledged that while every contract contains an implied covenant of good faith and fair dealing, such a covenant does not automatically transform every business relationship into a fiduciary relationship. *W.K.T. Distributing Co. v. Sharp Electronics Corp.*, 746 F.2d 1333, 1337 (8th Cir. 1984).

Usually a breach of fiduciary duty claim involving the duty of loyalty revolves around conflict of interest and/or self-dealing. These situations are often those in which there is a question as to whether a director or officer has taken an action to benefit himself, or a relative or friend; or has usurped a corporate opportunity. Matheson and Garon, 18 Minnesota Practice: Corporate Law and Practice §§ 3.31–3.33.

a. Interested Directors

The Eighth Circuit has stated that directors and officers in fiduciary relation to a corporation cannot assume positions in conflict with interests in the corporation, and cannot deal with property of the corporation for their own personal benefit or advantage. *Bisbee v. Midland Linseed Products Co.*, 19 F.2d 24, 27 (8th Cir. 1927). M.S.A. § 302A.255, subd. 1 specifically addresses director conflicts of interest. The statute essentially permits material (financial) interests in a contract or transaction as long the party with the interest (the director, in this case) can sustain the burden of establishing that the contract or transaction was, fair and reasonable as to the corporation at the time it was authorized . . . ; that there is full disclosure of the pertinent material facts relating both to the transaction and the director's interest; that after such a disclosure, the contract is approved by majority shareholders (other than the director(s)), as well as by the board. M.S.A. § 302A.255, subd. 1(a)–(c). As long as the director acts in the best interests of the corporation, in good faith, having fully disclosed the interests, then the shareholders and board can approve such a transaction. Any time the shareholders or board approves such a transaction, such a decision must also comply with the standard set forth in M.S.A. § 302A.251. If not, the approval can be void or voidable.

Subdivision 2 goes on to define "material financial interest" as NOT being transactions fixing compensation either for the director himself or for other agents or employees of the corporation even though the director involved in making decisions about such matters is receiving compensation all the while. M.S.A. § 302A.255 at subd. 2(a). A director does have material financial interest in organizations in which the spouse, parents, children, spouses of children, brothers and sisters, and spouses of brothers and sisters have a material financial interest. M.S.A. § 302A.255 at 2(b).

In *Westgor v. Grimm*, 318 N.W.2d 56 (Minn. 1982) the Minnesota Supreme Court stated that in order to establish a claim which would show a breach of fiduciary duty, a "plaintiff must allege facts which show that the action attacked is so far opposed to the true interests of the corporation as to lead to the clear inference that no officer thus acting could have been influenced by an honest desire to secure such interests." 318 N.W.2d 56, 59 (Minn. 1982) (quoting *Warner v. E. C. Warner Co.*, 226 Minn. 565, 573, 33 N.W.2d 721, 726 (1948). The burden of proof lies with the fiduciary to prove that a transaction is in the interest of a corporation. M.S.A. § 302A.255, subd. 1; *Westgor v. Grimm*, 318 N.W.2d 56, 59 (Minn. 1982).

i. Duty to Disclose

Inherent to the duty of loyalty is a duty to disclose. M.S.A. § 302A.255, subd. 1. Parties in a fiduciary relationship must disclose material facts to each other. *Klein v. First Edina Nat'l Bank*, 293 Minn. 418, 421, 196 N.W.2d 619, 622 (1972). Where a fiduciary relationship exists, silence may constitute fraud. *Toombs v. Daniels*, 361 N.W.2d 801, 809 (Minn. 1985). The general rule under Minnesota law is that one party to a transaction has no duty to disclose material facts to the other, but a duty may exist when a fiduciary relationship exists between the parties, when disclosure is necessary to clarify information previously disclosed, or when one party has special knowledge of material facts to which the other does not have access. *Children's Broadcasting Corp. v. Walt Disney Co.*, 245 F.3d 1008, 1021 (8th Cir. 2001).

On the other hand, minority stockholders cannot invoke the rule that corporate officers owe the corporation an active duty of honesty and good faith, where the minority stockholders were in active management of the corporation and the transaction in question occurred with the minority stockholders' knowledge and consent. *Erickson-Hellekson-Vye Co. v. A. Wells Co.*, 217 Minn. 361, 374, 15 N.W.2d 162, 169 (Minn. 1944).

b. Usurping a Corporate Opportunity

One occupying a fiduciary relationship to a corporation may not exploit his position as an insider by appropriating to himself a business opportunity which should belong to the corporation. *Matter of Villa Maria, Inc.*, 312 N.W.2d 921, 922 (Minn. 1981). The supreme court in *Miller v. Miller* adopted a two-pronged analysis to determine whether a director or officer would be liable for breach of fiduciary duty in the context of the corporate opportunity doctrine. *Miller v. Miller*, 301 Minn. 207, 222 N.W.2d 71, 81 (Minn. 1974). The threshold question is whether or not the opportunity seized was a business opportunity. The second prong of the analysis requires determination of whether one breached his fiduciary duty by taking advantage of an opportunity deemed corporate in the legal sense. *Miller v. Miller*, 222 N.W.2d at 82. The *Miller* court stated then that a director would have to meet his burden by showing that he acted in good faith and whether he exercised the diligence, devotion, care, and fairness toward the corporation which ordinarily prudent men would exercise under similar circumstances. *Miller v. Miller*, 222 N.W.2d at 82.

2. Duty of Care

A fiduciary must be attempting to act in the best interests of a corporation, but not necessarily with sound judgment. M.S.A. § 302A.251, subd. 1. The relevant statutes state that a corporate fiduciary must act with the care an ordinarily prudent person in a like position would exercise under similar circumstances. In 1948, the Minnesota Supreme Court stated that "[a]bsent fraud, collusion, or like misconduct, the corporation, and consequently the plaintiff, would have no cause of action" against a director or an officer for the breach of fiduciary duty. *Warner v. E.C. Warner, Co.*, 226 Minn. 565, 573, 33 N.W.2d 721, 726 (1948); Matheson and Garon, 18 Minnesota Practice: Corporation Law and Practice § 3.35. The court went on to say that "the law does not justify recovery in representative suits for mere errors of judgment in handling corporate affairs." *Warner*, 226 Minn. at 573, 33 N.W.2d at 726. This holding supports the notion that Minnesota courts are "reluctant to interfere with the inner-workings of a corporation." *Westgor v. Grimm*, 318 N.W.2d 56, 58–59 (Minn. 1982). In fact, since the Warner decision in 1948, no Minnesota court has held a director liable in situations where there has been merely bad judgment but no self-dealing. Matheson and Garon, 18 Minnesota Practice: Corporate Law and Practice § 3.35. It's likely that there would be limits on a corporate fiduciary's ability to make mistakes, but Minnesota courts have not tested those limits yet. *See, e.g., Smith v. Van Gorkam*, 488 A.2d 858 (Del. 1985).

3. Closely Held Corporations

In a closely held corporation, the relationship among shareholders is analogous to that of a partnership, and the shareholders owe one another a fiduciary duty. *Pedro v. Pedro*, 489 N.W.2d 798, 801 (Minn. Ct. App. 1992); Swanson v. Upper Midwest Industries, Inc., 2002 WK 857744, *12 (Minn. Ct. App.); *PJ Acquisition Corp. v. Skoglund*, 453 N.W.2d 1, 19 (stating that M.S.A. § 302A.751, subd. 3a (1998) recognizes fiduciary obligations of shareholders of closely held corporations) (Yetka, J., dissenting). The fiduciary duty of shareholders consists of the "highest standards of the integrity and good faith in their dealings with each other." *Pedro*, 489 N.W.2d at 801. Good faith in this context means dealing "openly, honestly and fairly" with other shareholders. *Pedro*, 489 N.W.2d at 801. Fiduciary duties of shareholders in a close corporation include the duty to disclose material information about the corporation. *Berreman v. West Pub. Co.*, 615 N.W.2d 362 (Minn. Ct. App. 2000). As in other contexts, whether someone has breached his fiduciary duty is a question of fact. *Miller Waste Mills, Inc. v. Mackay*, 520 N.W.2d 490, 496 (Minn. Ct. App. 1994).

While, in general, shareholders in a closely held corporation owe a fiduciary duty to other shareholders, only a majority or controlling shareholder owes a fiduciary duty to the corporation or its other shareholders. *Advanced Communication Design, Inc. v. Follett*, 615 N.W.2d 285, 294 (Minn. 2000); *see also Westgor v. Grimm*, 318 N.W.2d 56, 58 (Minn. 1982) (stating controlling shareholder has a fiduciary relationship with corporation); *Priddy v. Edelman*, 883 F.2d 438, 445 (6th Cir. 1989) (holding that absent control of corporation, minority shareholders owed no fiduciary duty to other shareholders). While this may be generally true, courts have recognized the similarity of the day-to-day operations of closely held corporations to those of partnerships. *Follett*, 615 N.W.2d at 294 (citing *Westland Capital Corp. v. Lucht Eng'g Inc.*, 308 N.W.2d 709, 712 (Minn. 1981). When comparing a closely held corporation to a partnership, courts have held that in a closely held corporation where shareholders participate equally in the management of the corporation similar to partners, they may have fiduciary duties to each other requiring them to exercise the highest degree of integrity and good faith in their dealings. *Follett*, 615 N.W.2d at 294; *see also Fewell v. Tappan*, 223 Minn. 483, 493–94, 27 N.W.2d 648, 654 (1947) (quoting *Venier v. Forbes*, 223 Minn. 69, 74, 25 N.W.2d 704, 708 (1946)). The *Follett* court stated that "where a shareholder has only nonvoting shares in a closely held corporation and is not a director, clearly any significant ability to control corporate decision-making is lacking," and thus that shareholder would not owe a fiduciary duty.

Fiduciary Duty of a Trustee

A trustee is subject to the underlying equitable and fiduciary duties toward trust beneficiaries imposed by the common law of trusts. *Matter of Trust Known as Great Northern Iron Ore Properties*, 263 N.W.2d 610, 620 (Minn. 1978). These duties generally fall into the same two categories as with corporate fiduciaries: a duty of loyalty, a duty of care.

Minnesota law dictates that a fiduciary relationship exists when one person puts confidence in another, resulting in the second person having superiority over and influence on the first. *Toombs v. Daniels*, 361 N.W.2d 801, 809 (Minn. 1985). Whether a fiduciary relationship exists is a question of fact. *Toombs v. Daniels*, 361 N.W.2d 801, 809 (Minn. 1985).

A trustee/beneficiary relationship is defined by statute for those cases in which the relationship is explicitly established. M.S.A. § 501B.151, subd. 10 (defining a trustee as an individual or corporation having trust powers acting under wills, agreements, court orders, and other instruments). In *Schug v. Michael*, the Minnesota Supreme Court further clarified the factors constituting a trustee/beneficiary relationship by holding that the use of the words trust agreement, trustee, and beneficiary in a written instrument is not dispositive of a trust relationship. 310 Minn. 22, 27, 245 N.W.2d 587, 591 (1976). The court stated that in order to constitute an express trust, there must be three elements: 1) a designated trustee subject to enforceable duties, 2) a designated trustee subject to equitable duties, and 3) a definite trust res wherein the trustee's title and estate is separated from the vested beneficial interest of the beneficiary. *Schug v. Michael*, 245 N.W.2d at 591 (quoting *In re Declaration of Trust by Bush*, 249 Minn. 36, 43, 81 N.W.2d 615, 620 (1957)). In this case, the court concluded that because the defendant was a designated trustee under the trust agreement; that as trustee, he had the duty of setting aside and holding certain stock for the plaintiff (as well as collecting and paying dividends for him); and that the plaintiff was a designated beneficiary, a trust relationship subject to enforceable duties existed under Minnesota law.

A. Duty of Loyalty

Adopting the language of the Restatement, the Minnesota Supreme Court outlined components of the duty of loyalty. For example, a trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary. *Schug*, 310 Minn. At 28, 310 Minn. 22, 245 N.W.2d 587, at 591 (quoting Restatement (Second) of Trusts § 170. A trustee cannot use fiduciary funds for his own benefit. *Vorlander v. Keyes*, 1 F.2d 67, 69 (8th Cir. 1924); *Freundschuh v. Freundschuh*, 559 N.W.2d 706, 711 (Minn. Ct. App. 1997) A trustee is forbidden from purchasing or dealing in the trust property for his own benefit or on his own behalf, either directly or indirectly. *In Trust of Baker*, 2001 WL 379927, *3 (Minn. Ct. App. 2001) (quoting *Malcomson v. Goodhue County Nat'l Bank*, 198 Minn. 562, 567, 272 N.W. 157, 160 (1936)). The trustee cannot sell trust property to himself regardless of whether he makes the purchase in good faith and pays fair consideration. *Schug*, 310 Minn. At 28, 310 Minn. 22, 245 N.W.2d 587, at 591–92 (quoting Restatement (Second) of Trusts § 170 cmt. B. In addition, a trustee must take and keep control of trust property, preserve trust property, and keep trust property separate from his own. *Schug*, 310 Minn. At 28, 310 Minn. 22, 245 N.W.2d 587, at 591 (citing Restatement (Second) of Trusts §§ 175 cmt. C, and 176, 179); *Arnold v. Smith*, 121 Minn. 116, 129, 140 N.W. 748, 753 (1913) (stating that it makes no difference whether a fiduciary acquires part of the estate he is charged to protect by deliberate fraud or innocently). A trustee cannot acquire property through information obtained through a fiduciary relation. *Matter of Estate of Kroyer*, 385 N.W.2d 31, 34 (Minn. Ct. App. 1986) (stating that when a person in a fiduciary relationship to another acquires property by taking advantage of relationship, even if she acts in good faith, constructive trust arises in favor of the person equitably entitled to property).

The trustee in dealing with the beneficiary on the trustee's own account is under a duty to the beneficiary to deal fairly with him and to communicate to him all material facts in connection with the transaction which the trustee knows or should know. Schug, 310 Minn. At 28, 310 Minn. 22, 245 N.W.2d 587, at 591 (quoting Restatement (Second) of Trusts § 170 (date?); *see also Bailey's Trust v. Bailey*, 241 Minn. 143, 149, 62 N.W.2d 829, 833 (1954). In other words, a trustee has a duty to disclose fully, frankly, and without reservation all information pertaining to the trust. *In Re Trusteeship Under Will of Rosenfeldt*, 185 Minn. 425, 430, 241 N.W. 573, 575 (1932); *In re Trust of Baker*, 2001 WL 379927, *3 (Minn. Ct. App. 2001) The trustee's duty in this situation is characterized as "the fullest of measure of disclosure." *In Re Enger's Will*, 225 Minn. 229, 239, 30 N.W.2d 694, 701 (Minn. 1948). To fulfill this duty, the trustee is required to keep records which will provide a complete and accurate foundation for the report. *Bailey*, 241 Minn. at 149, 62 N.W.2d at 833. Whether or not a particular system of bookkeeping reasonably fulfills this obligation ordinarily is a fact question for the trial court. *Bailey*, 62 N.W.2d at 833–34.

Trustees also have a duty to act impartially. "If a trust is created for beneficiaries in succession, the trustee is under a duty to the successive beneficiaries to act with regard to their respective interests . . . . The precise meaning of the trustee's duty of impartiality and the balancing of competing interests and objectives inevitably are matters of judgment and interpretation. Thus, the duty and balancing are affected by the purposes, terms, distribution requirements, and other circumstances of trust, not only at the outset but as they may change from time to time." *Norwest Bank Minnesota North, N.A. v. Beckler*, 663 N.W.2d 571, 580 (Minn. Ct. App. 2003). A trustee holding for successive beneficiaries owes each a duty to administer the trust impartially for all beneficiaries. *Norwest*, 663 N.W.2d at 581 (quoting George G. Bogert, et al., The Law of Trusts and Trustees, § 541, at 163 (2d ed. rev. 1993); *In Re Boright*, 377 N.W.2d 9, 13 (Minn. 1985). This is codified in M.S.A. § 501B.60, subd. 3 which states that a fiduciary shall administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries, except to the extent that the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries.

1. Defense against Self-Dealing

A trustee can defend himself against self-dealing if the settlor expressly authorizes it. For example, where a settler authorizes a trustee bank to deal in mutual fund shares owned by that same bank or affiliate, the protection against self-dealing can be waived. *Matter of Irrevocable Inter Vivos Trust Established by R. R. Kemske*, 305 N.W.2d 755, 760 (Minn. 1981). As noted above, good faith is not a defense against self-dealing.

B. Duty of Care

A trustee has the duty to exercise reasonable care, skill, and caution in investing and managing trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. M.S.A. § 501B.151, subd.2(a); *Norwest Bank Minnesota North, N.A. v. Beckler*, 663 N.W.2d 571, 580 (Minn. Ct. App. 2003); *see also In Re Trusts Created by Hormel*, 504 N.W.2d 505, 511 (Minn. Ct. App. 1993) (stating that a trustee has a duty to manage the trust prudently). This is called the "prudent investor" rule. M.S.A. § 501B.151, subd. 2(b) states that a "trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust. The statute then lists a series of factors a trustee may consider "without limitation" in making investment decisions, and they are: general economic conditions; the possible effect of inflation; the expected tax consequences of investment decisions and strategies; the role that each investment or course of action plays within the overall trust portfolio; the expected total return from income and the appreciation of capital; other resources of the beneficiaries known to the trustee, including earning capacity; needs for liquidity, regularity of income, and preservation or appreciation of capital; and an asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries if consistent with the trustee's duty of impartiality.

Where a trustee has discretion, he or she may not exercise that discretion in a manner that defeats the settlor's intent or the purposes of the trust. *Norwest*, 633 N.W.2d at 580 (citing *United States v. O'Shaughnessy*, 517 N.W.2d 574, 577 (Minn. 1994). Unlike with self-dealing, however, good faith is a mitigating factor. If trustees act in good faith from proper motives and within the bounds of reasonable judgment, a Minnesota court will not interfere with his or her decisions. *Norwest*, 663 N.W.2d at 580–81. M.S.A. § 501B.151, subd. 6 notes that the prudent investor rule is a test of conduct and not of results, and that compliance with the rule is determined in light of the facts and circumstances existing at the time of a trustee's decision, and not by hindsight.

There is no absolute duty to diversify trust investments. *In Re Trusteeship of Trust of Williams*, 631 N.W.2d 398, 405–06 (Minn. Ct. App. 2001). The current standard for determining reasonable care in the context of diversification is whether, in light of the settlor's intent and the beneficiaries' interests, a trustee's duty as a prudent manager required it to support diversification or convince other trustees to diversify the trust. *In Re Trusteeship of Trust of Williams*, 631 N.W.2d at 406. M.S.A. § 501B.151, subd. 3 states that a trustee must diversify "unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying." This squares with the *Williams* decision.

In *Schug*, the Minnesota Supreme Court adopted the Restatement in holding that a trustee has a duty to keep control of trust property, to preserve trust property, and to keep trust property separate from the trustee's own property. 310 Minn. 22, 29, 245 N.W.2d 587, 592 (Minn. 1976). This includes a duty to use reasonable care and diligence in examining the accounting and objecting to it if reasonable and prudent to do so. *In Re Kemske*, 305 N.W.2d 755, 763 (Minn. 1981).

In the context of reasonable care, knowledge relating to the reasonableness of a decision will be imputed to the trustee if the court determines that the trustee should have known it. *See In Re Rosenfeldt's Will*, 185 Minn. 425, 430, 241 N.W. 573, 575 (1932).

C. Remedy: Constructive Trust

Whenever legal title to property is obtained through fraud, oppression, duress, undue influence, force, crime . . . or by taking improper advantage of a confidential or fiduciary relationship, a constructive trust arises in favor of the person who was equitably entitled to the property. *Wright v. Wright*, 311 N.W.2d 484, 485 (Minn. 1981); *In the Matter of the Estate of Kroyer*, 385 N.W.2d 31, 35 Minn. Ct. App. 1986). *Iroquois Iron Co. v. Kruse*, 241 F. 433, 441 (8th Cir. 1917). A constructive trust is an equitable remedy imposed to prevent unjust enrichment. *Dietz v. Dietz*, 244 Minn. 330, 334, 70 N.W.2d 281, 285 (1955). Courts may impose a constructive trust where a plaintiff shows the existence of a fiduciary relation and the defendant's abuse of the confidence and trust bestowed on him to the plaintiff's detriment. *Dietz*, 70 N.W.2d at 285. A fiduciary relationship in a strict sense is not a prerequisite, and any relationship giving rise to justifiable reliance is sufficient. *Dietz*, 70 N.W.2d at 285.

DIVISION B

NEGLIGENCE

CATEGORY 25

FAULT AND CULPABILITY

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INTRODUCTORY NOTE

FAULT AND CULPABILITY

There are different degrees of culpability that apply to civil cases, depending on the plaintiff's theory of recovery. In general, tort claims are based on: (1) intent; (2) negligence; or (3) strict liability. The definition of "fault" in the Comparative Fault Act, M.S.A. § 604.01, subd. 1a, also includes breach of warranty. There are other nuances in degrees of fault or culpability that may be relevant, depending on the issues in a case. For example, a common carrier sued for negligence may be held to a standard requiring the exercise of a high degree of care.

In cases involving punitive damages claims, the plaintiff must establish that the defendant deliberately disregarded the rights or safety of the plaintiff or others to justify the award of punitive damages. A similar standard applies in cases where employees seek to escape the exclusive remedy limitation of the Workers' Compensation Act by proving that their employers intentionally injured them, or where a plaintiff seeks to recover punitive damages under the Minnesota punitive damages statute.

In yet other cases, the plaintiff may be obligated to prove culpable conduct on the part of a defendant in order to escape a qualified privilege or immunity established by either state or federal law. The following discussion sets out the legal standards for tort claims and the degrees of culpability that may be applicable in special cases involving privileges or immunities, along with references to the jury instructions, if any, where the concepts are identified and explained in more detail. It includes (1) intent; (2) reckless misconduct; (3) gross negligence; (4) negligence; (5) common carriers; (6) strict liability for abnormally dangerous activities; (7) strict liability for defective products; (8) statutory strict liability for injuries caused by dogs and common law liability for dangerous animals; (9) warranty; (10) deliberate disregard; and (11) malice.

(1) Intent (CIVJIG 60.10). In *Victor v. Sell*, 301 Minn. 309, 314, 222 N.W.2d 337, 340 (1974), the supreme court indicated approval of a definition of "intent" taken from the Restatement, (Second) of Torts § 8A (1965). That section reads as follows:

> The word "intent" is used throughout the Restatement of this Subject to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.

The Minnesota courts have continued to adhere to the Restatement standard. *E.g., Scott v. Forest Lake Chrysler-Plymouth-Dodge*, 668 N.W.2d 45, 48 (Minn. Ct. App. 2003) (intentional violations of Minnesota Motor Vehicle Retail Installment Sales Act); *R.W. v. T.F.*, 528 N.W.2d 869, 872 (Minn. 1995) (construing intentional act exclusion in homeowner's policy, and inferring intent as a matter of law, where harm is substantially certain to result, even if no actual desire or intent to transmit herpes); *Kaluza v. Home Ins. Co.*, 403 N.W.2d 230, 233 (Minn. 1987) (issue of whether insurer intentionally obstructed employee who sought workers' compensation benefits); *German Mut. Ins. Co. v. Yeager*, 554 N.W.2d 116, 117 (Minn. Ct. App. 1996), rev. denied (Minn. Dec. 23, 1966) ("[w]hen the nature and circumstances of the insured's act are such that harm is substantially certain to result, intent to harm is inferred as a matter of law"); *Plath v. Plath*, 402 N.W.2d 577, 579 (Minn. Ct. App. 1987) (defining intent element of battery), rev'd on other grounds, 428 N.W.2d 392 (Minn. 1988).

However, the intent requirement may be construed narrowly, depending on the context. In cases involving injuries to an employee, the employee's exclusive remedy is the workers' compensation act, unless the employer intentionally injured the employee. That requirement has been construed narrowly to require a showing that the employer consciously and deliberately intended to injure the employee. *Gunderson v. Harrington*, 632 N.W.2d 695, 701 (Minn. 2001); *Kaess v. Armstrong Cork Co.*, 403 N.W.2d 643, 644 (Minn. 1987); *Hildebrandt v. Whirlpool Corp.*, 364 N.W.2d 394, 395 (Minn. 1985).

(2) Reckless Misconduct (CIVJIG 25.37). The Restatement (Second) of Torts § 500 (1965), defines "reckless disregard of safety of another" as follows:

> The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

Reckless misconduct consists of consciously disregarding a high risk of injury or acting indifferently in the face of that risk, or occurs where the defendant has knowledge of the facts that create a risk but does not appreciate the high degree of risk involved, even though a reasonable person in that position would know of the risk. *Id.*, comment a.

(3) Gross Negligence (CIVJIG 25.35). In *Dakins v. Black*, 195 Minn. 91, 94, 261 N.W. 870, 872 (1935) (construing a guest statute), the supreme court defined gross negligence as "negligence in a very high degree," or "great or excessive negligence." *See also Terveer v. Norling Bros. Silo Co.*, 365 N.W.2d 279, 281 (Minn. Ct. App. 1985). A showing of gross negligence is essential for an employee to sue a co-employee for injuries arising out of the course and scope of employment. M.S.A. § 176.061, subd. 5.

(4) Negligence (CIVJIG 25.10). In the usual case, negligence "is the failure to exercise such care as persons of ordinary prudence usually exercise under similar circumstances. The degree of care is that which persons of ordinary prudence usually exercise under similar circumstances." *Mingo v. Extrand*, 180 Minn. 395, 396, 230 N.W. 895, 896 (1930). In *Ferguson v. Northern States Power Co.*, 307 Minn. 26, 33, n. 3, 239 N.W.2d 190, 194, n. 3 (Minn. 1976), the court noted that the duty that is imposed on electric companies is frequently "expressed as requiring the exercise of care 'commensurate with the peril reasonably to be apprehended to those who may have occasion to come in proximity to (its power lines).' As the risk increases so does the standard of care. Under the circumstances of this case, where high-voltage electricity is being transmitted through a residential neighborhood, the defendant must be held to a high degree of care." The standard is still reasonable care under the circumstances, however.

(5) Common Carriers (CIVJIG 48.15). Common carriers are also held to a high degree of care, so that even slight negligence will subject them to liability. *George v. Estate of Baker*, 724 N.W.2d 1, 6 (Minn. 2006). *Lindstrom v. Yellow Taxi Co. of Minneapolis*, 298 Minn. 224, 226, 214 N.W.2d 672, 675 (1974); *Urban v. Minneapolis St. Ry.*, 256 Minn. 1, 5, 96 N.W.2d 698, 700 (1959).

(6) Strict Liability for Abnormally Dangerous Activities (CIVJIG 85.55). Strict liability for abnormally dangerous activities applies in the absence of negligence. While the supreme court applied the rule of *Rylands v. Fletcher*, L.R. 3 H.L. 330 (1868) as early as *Cahill v. Eastman*, 18 Minn. 324 (1872) (1871), the court has not settled on any single definition of strict liability. *See Mahowald v. Minnesota Gas Co.*, 344 N.W.2d 856, 859–862 (Minn. 1984). It has applied Restatement (Second) of Torts §§ 519–520 (1965). *See Cairl v. City of St. Paul*, 268 N.W.2d 908, 911 (Minn. 1978); *Ferguson v. Northern States Power Co.*, 307 Minn. 26, 32, 239 N.W.2d 190, 193–94 (1976); *Quigley v. Village of Hibbing*, 268 Minn. 541, 543, 129 N.W.2d 765, 767 (1964).

(7) Strict Liability for Defective Products (CIVJIG 75.30). Strict liability in defective products cases is substantially merged with negligence theory in cases involving design defect and inadequate warning cases, but strict liability does apply in cases involving manufacturing flaws. *Bilotta v. Kelley Co.*, 346 N.W.2d 616, 622–23 (Minn. 1984). Strict liability theory also applies to product sellers other than manufacturers. *Hudson v. Snyder Body, Inc.*, 326 N.W.2d 149, 158 (Minn. 1982) (Simonett, J., concurring in part and dissenting in part); *Frey v. Montgomery Ward & Co.*, 258 N.W.2d 782, 791 n. 4 (Minn. 1977); *Farr v. Armstrong Rubber Co.*, 288 Minn. 83, 89, 179 N.W.2d 64, 68 (1970); *Marcon v. Kmart Corp.*, 573 N.W.2d 728, 730 (Minn. Ct. App. 1998).

(8) Statutory strict liability for injuries caused by dogs (CIVJIG 38.30) and common law strict liability for dangerous animals (CIVJIG 38.10). M.S.A. § 347.22 provides that a dog owner is absolutely liable, subject to the defense of provocation, if a dog attacks or injures a person who is acting peaceably in a place where the person has a lawful right to be. The Minnesota Supreme Court first recognized the scienter action in *Fake v. Addicks*, 45 Minn. 37, 47 N.W.2d 450 (1890). The court held that once an owner is on notice that the owner's animal has exhibited a vicious nature, the owner is liable harm caused by the animal if the owner elects to keep the animal. The theory applies only to owners of domesticated animals. *See Clark v. Brings*, 287 Minn. 73, 75, 169 N.W.2d 407, 409 (1969). *See* Category 38.

(9) Warranty (CIVJIG 22.10–22.70). Breach of warranty is "fault" subject to comparison under the Comparative Fault Act, M.S.A. § 604.01, subd. 1a. *E.g., Lesmeister v. Dilly*, 330 N.W.2d 95, 101 (Minn. 1983); *Peterson v. Bendix Home Systems, Inc.*, 318 N.W.2d 50, 52–53 (Minn. 1982).

(10) Deliberate Disregard (CIVJIG 94.10). M.S.A. § 549.20, subd. 1, provides for the award of punitive damages in the following cases:

> (a) Punitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others.
>
> (b) A defendant has acted with deliberate disregard for the rights or safety of others if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights or safety of others; and:
>
> > (1) deliberately proceeds to act in conscious or intentional disregard of the high degree of probability of injury to the rights or safety of others; or
> >
> > (2) deliberately proceeds to act with indifference to the high probability of injury to the rights or safety of others.

The statute requires a showing that the defendant "acted with deliberate disregard for the rights or safety of others." *Johns v. Harborage I, Ltd.*, 585 N.W.2d 853, 863 (Minn. Ct. App. 1998); *Molenaar v. United Cattle Co.*, 553 N.W.2d 424 (Minn. Ct. App. 1996), rev. denied (Minn. Oct. 15, 1996).

(11) Malice. The term "malice" may arise in several contexts. In general, malice "means nothing more than the intentional doing of a wrongful act without legal justification or excuse, or, otherwise stated, the willful violation of a known right." *Anderson v. Anoka Hennepin Independent School Dist. 11*, 678 N.W.2d 651, 662 (Minn. 2004); *Kelly v. City of Minneapolis*, 598 N.W.2d 657, 663 (Minn. 1999); *Rico v. State*, 472 N.W.2d 100, 107 (Minn. 1991). *See Carnes v. St. Paul Union Stockyards Co.*, 164 Minn. 457, 462, 205 N.W. 630, 631 (1925) (malicious interference with employment); *Sorenson v. Chevrolet Motor Co.*, 171 Minn. 260, 264, 214 N.W. 754, 755 (1927) (malicious interference with contract); *Lammers v. Mason*, 123 Minn. 204, 205–06, 143 N.W. 359, 360 (1913) (malicious prosecution).

The term "malice" has two distinct meanings in defamation cases. It also is relevant in cases involving claims for official immunity, where it has a slightly different meaning.

Malice—Defamation (Common Law Standard) (CIVJIG 50.35). In a defamation case where a defamatory statement is covered by a common law qualified privilege, the plaintiff has the burden of overcoming the privilege by establishing common law actual malice, which is defined as "actual ill-will or a design causelessly and wantonly to injure plaintiff." *Bol v. Cole*, 561 N.W.2d 143, 150 (Minn. 1997); *McKenzie v. William J. Burns Intern. Detective Agency*, 149 Minn. 311, 312, 183 N.W. 516, 517 (1921).

Malice—Defamation (Constitutional Standard) (CIVJIG 50.40). In *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), the United States Supreme Court held that public officials who are libeled must prove with convincing clarity that the libelous statements were published with actual malice. Actual malice is shown by publication with knowledge of the falsity of the statement or in reckless disregard of the truth or falsity of the publication. *Id.* at 279–280. Reckless disregard means publication with substantial doubts about the truth of the matter. *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262, 267 (1968). Unlike common law actual malice, which focuses on the defendant's state of mind, the constitutional standard in *New York Times Co. v. Sullivan* focuses on the defendant's knowledge of the truth or falsity of the defamatory statement.

Official Immunity (CIVJIG 25.40). In cases where a state or municipal employee is entitled to claim official immunity, the plaintiff may overcome the immunity by showing that the defendant engaged in willful and malicious conduct. In *Rico v. State*, 472 N.W.2d 100, 107 (Minn. 1991), the supreme court said that malice "means nothing more than the intentional doing of a wrongful act without legal justification or excuse, or, otherwise stated, the willful violation of a known right." Willful and malicious are synonymous in official immunity cases.

The standard "contemplates less of a subjective inquiry into malice, which was traditionally favored at common law, and more of an objective inquiry into the legal reasonableness of an official's actions." *State by Beaulieu v. City of Mounds View*, 518 N.W.2d 567, 571 (Minn. 1994).

NEGLIGENCE—INTRODUCTION

There are four elements in a negligence claim: (1) there must be a duty; (2) a breach of duty; (3) the breach must have been the proximate cause of plaintiff's injury; and (4) the plaintiff must in fact have suffered injury. *Doe 169 v. Brandon*, 845 N.W.2d 174, 177 (Minn. 2014); *Engler v. Illinois Farmers Ins. Co.*, 706 N.W.2d 764, 767 (Minn. 2005); *Funchess v. Cecil Newman Corp.*, 632 N.W.2d 666, 672 (Minn. 2001); *Johnson v. State*, 553 N.W.2d 40, 49 (Minn. 1996); *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995); *Schweich v. Ziegler, Inc.*, 463 N.W.2d 722, 729 (Minn. 1990); *Hudson v. Snyder Body, Inc.*, 326 N.W.2d 149, 157 (Minn. 1982). There are variations on the general formulation that are covered in specific jury instructions. They include the rules governing common carriers (CIVJIG 48.10), employer liability for the torts of employees (CIVJIG 55.20–.30), parental liability for negligent supervision of their children (CIVJIG 70.25), products liability (CIVJIG 75.35), professional liability (CIVJIG 80.10), possessors of land (CIVJIG 85.25), the duties of motor vehicle passengers and drivers (CIVJIG 65.10), and social host liability (CIVJIG 45.60).

Duty. In negligence cases, duty is an obligation to conform to a particular standard of conduct toward another. *Vaughn v. Northwest Airlines, Inc.*, 558 N.W.2d 736, 742 (Minn. 1997); *Minneapolis Employees Retirement Fund v. Allison-Williams Co.*, 519 N.W.2d 176, 182 (Minn. 1994); *Rasmussen v. Prudential Ins. Co.*, 277 Minn. 266, 268–69, 152 N.W.2d 359, 362 (1967); *Hartmon v. National Heater Co.*, 240 Minn. 264, 272, 60 N.W.2d 804, 810 (1953). A legal duty may be imposed by either common law or statute. *Scott v. Independent School Dist. No. 709*, 256 N.W.2d 485, 488 (Minn. 1977), citing *Osborne v. McMasters*, 40 Minn. 103, 105, 41 N.W. 543, 543–544 (1889). "All that the statute does is to establish a fixed standard by which the fact of negligence may be determined. The gist of the action is still negligence, or the nonperformance of a legal duty to the person injured." *Osborne*, 40 Minn. at 105, 41 N.W. at 544. *Also see Wendinger v. Forst Farms, Inc.*, 662 N.W.2d 546, 554 (Minn. Ct. App. 2003). The rule applies equally to violations of ordinances, *Pacific Indemnity Co. v. Thompson-Yeager, Inc.*, 260 N.W.2d 548, 559 (Minn. 1977), and in some cases to regulatory standards. *Gray v. Badger Mining Co.*, 676 N.W.2d 268, 275 (Minn. 2004).

Duty determinations depend in part on foreseeability, *e.g., Doe 169 v. Brandon*, 845 N.W.2d 174, 177 (Minn. 2014) (sexual abuse by volunteer at church youth-ministry program); *Domagala v. Rolland*, 805 N.W.2d 14, 22–23 (Minn.2011) (injury to plaintiff assisting in changing of skidloader attachment); *Whiteford v. Yamaha Motor Corp.*, 582 N.W.2d 916, 918 (Minn. 1998) (product manufacturer's duty is to protect against foreseeable dangers), and in part on policy considerations, *e.g., Lundgren v. Fultz*, 354 N.W.2d 25, 29 (Minn. 1984) (psychiatrist's duty to warn third persons of danger). Absent creation of a foreseeable risk of injury, a defendant may be liable if there is a special relationship between the defendant and the person who was injured, *see Doe 169 v. Brandon*, 845 N.W.2d 174, 177 (Minn. 2014); *Domagala v. Rolland*, 805 N.W.2d 14, 22–23 (Minn.2011), or between the defendant and the person who causes the injury. *See Lundgren v. Fultz*, 354 N.W.2d 25, 27 (Minn. 1984).

While the duty issue is a question of law for the court, *Molloy v. Meier*, 679 N.W.2d 711, 716 (Minn. 2004); *Johnson v. State*, 553 N.W.2d 40, 49 (Minn. 1996); *H.B. by and through Clark v. Whittemore*, 552 N.W.2d 705, 707 (Minn. 1996); *Larson v. Larson*, 373 N.W.2d 287, 289 (Minn. 1985), where the foreseeability of a particular injury is in doubt, it may be permissible to submit the issue to the jury, *Lundgren*, 354 N.W.2d at 28.

In order for a statute to establish a duty, the person who is injured must be a person for whose protection the statute is intended, and that person must suffer the type of injury the statute was intended to avoid. *Anderson v. Anoka Hennepin Independent School Dist. 11*, 678 N.W.2d 651, 662–63 (Minn. 2004); *Zorgdrager v. State Wide Sales, Inc.*, 489 N.W.2d 281, 284 (Minn. 1992); *Scott v. Independent School Dist. No. 709*, 256 N.W.2d 485, 488 (Minn. 1977). Violation of the statute may be negligence per se. *Whiteford*, 582 N.W.2d at 920.

Standard of Care—Breach of Duty. The common law standard of care is the care a reasonable person would exercise under the same or similar circumstances. *Doe 169 v. Brandon*, 845 N.W.2d 174, 177 (Minn. 2014); *Domagala v. Rolland*, 805 N.W.2d 14, 22 (Minn. 2011); *Minneapolis Employees Retirement Fund v. Allison-Williams Co.*, 519 N.W.2d 176, 182 (Minn. 1994); *Hartmon v. National Heater Co.*, 240 Minn. 264, 272, 60 N.W.2d 804, 810 (1953). In a negligence per se case, the statutory standard substitutes for the ordinary prudent person standard of care. *Anderson v. State, Department of Natural Resources*, 693 N.W.2d 181, 189–90 (Minn. 2005). Children are held to the standard of care of a reasonable child of like age, intelligence, and experience, in the same or similar circumstances, *e.g., Kachman v. Blosberg*, 251 Minn. 224, 230–31, 87 N.W.2d 687, 693 (1958); *Deach v. St. Paul City Ry.*, 215 Minn. 171, 176, 9 N.W.2d 735, 738 (1943), unless they are engaged in adult activities, narrowly defined to date to include operation of automobiles, airplanes, or powerboats, *Dellwo v. Pearson*, 259 Minn. 452, 107 N.W.2d 859 (1961), or handling guns. *Huebner v. Koelfgren*, 519 N.W.2d 488, 490 (Minn. Ct. App. 1994).

The question of whether a duty is breached is normally a matter for the jury. *Canada v. McCarthy*, 567 N.W.2d 496, 505 (Minn. 1997); *Oakland v. Stenlund*, 420 N.W.2d 248, 250 (Minn. Ct. App. 1988), rev. denied (Minn. April 20, 1988). The issue is whether the person charged with negligence used reasonable care under all the circumstances. On occasion, the jury may be instructed on specific applications of the general negligence standard. The emergency rule is a good example. However, the emergency doctrine is simply a particular application of the reasonable care standard in negligence cases. *Brady v. Kroll*, 244 Minn. 525, 530, 70 N.W.2d 354, 358 (1955).

Negligence may be established by direct or circumstantial evidence. Res ipsa loquitur, one form of circumstantial evidence, may be utilized to establish the breach if the elements are satisfied. *E.g., Hoven v. Rice Memorial Hospital*, 396 N.W.2d 569, 572 (Minn. 1986). Res ipsa loquitur is an inference that may be rejected or accepted by the jury. *Mahowald v. Minnesota Gas Co.*, 344 N.W.2d 856, 864 (Minn. 1984).

Proximate Cause. The Minnesota Supreme Court has consistently affirmed the rule in *Christianson v. Chicago, St. P.,M. & O. Ry. Co.*, 67 Minn. 94, 97, 69 N.W. 640, 641 (1896):

> What a man may reasonably anticipate is important and may be decisive, in determining whether an act is negligent, but is not at all decisive in determining whether that act is the proximate cause

> of an injury which ensues. If a person had no reasonable ground to anticipate that a particular act would or might result in any injury to anybody, then, of course, the act would not be negligent at all; but, if the act itself is negligent, then the person guilty of it is equally liable for all its natural and proximate consequences, whether he could have foreseen them or not. Otherwise expressed, the law is that if the act is one which the party ought in the exercise of ordinary care to have anticipated was liable to result in injury to others, then he is liable for any injury proximately resulting from it, although he could not have anticipated the particular injury which did happen.

E.g., Schmidt v. Beninga, 285 Minn. 477, 490–91, 173 N.W.2d 401, 408–09 (1970); *Okrina v. Midwestern Corp.*, 282 Minn. 400, 405, 165 N.W.2d 259, 264 (1969); *Dellwo v. Pearson*, 259 Minn. 452, 456, 107 N.W.2d 859, 862 (1961). The Minnesota approach considers foreseeability in determining whether a defendant is negligent, but rejects foreseeability as an element of proximate cause in applying the hindsight analysis to make the proximate cause determination. However, while proximate cause may often reduce to an issue of cause-in-fact, it also is an important factor that denotes the need for limitation on legal liability:

> Courts have always used the tort doctrine of proximate cause, as distinguished from causation in fact, to implement public policy in establishing the parameters of liability. Thus this court has frequently quoted Prosser's statement that, "[a]s a practical matter, legal responsibility must be limited to those causes which are so close to the result, or of such significance as causes, that the law is justified in imposing liability. This limitation is not a matter of causation, it is one of policy * * * ." Prosser, The Minnesota Court on Proximate Cause, 21 Minn.L.Rev. 19, 22 (1937) * * * .

Lewellin v. Huber, 465 N.W.2d 62, 65 (1991).

The supreme court has also stated that a "negligent act is a direct, or proximate cause of harm if the act was a substantial factor in the harm's occurrence," *see Osborne v. Twin Town Bowl, Inc.*, 749 NW.2d 367, 372 (Minn. 2008), *citing George v. Estate of Baker*, 724 N.W.2d 1, 10 (Minn.2006). In *Lietz v. Northern States Power Co.*, 718 N.W.2d 865, 872 (Minn. 2006), the court stated that there is proximate cause between a negligent act and injury when a party in the exercise of reasonable care should have realized that the act was likely to cause injury to others, *citing Canada v. McCarthy*, 567 N.W.2d 496, 506 (Minn.1997).

The proximate cause issue may be decided by the court as a matter of law. If the issue becomes a question of fact for the jury, the standard used to make the proximate cause determination is the more simplified direct cause standard. The Minnesota Supreme Court has applied the "substantial factor" test advocated by the Restatement (Second) of Torts § 431 (1965) to determine whether a cause is "direct." *See, e.g., Flom v.*

Flom, 291 N.W.2d 914, 917 (Minn. 1980); *Lestico v. Kuehner*, 204 Minn. 125, 133, 283 N.W. 122, 127 (1938); *Peterson v. Fulton*, 192 Minn. 360, 364, 256 N.W. 901, 903 (1934). Under the "substantial factor" test, negligent conduct is the direct cause of harm to another if it is a substantial factor in bringing about the harm. *See* Restatement (Second) Torts § 431 (1965). *See also Kronzer v. First Nat'l Bank of Minneapolis*, 305 Minn. 415, 426, 235 N.W.2d 187, 194 (1975); *Mickelson v. Kernkamp*, 230 Minn. 448, 458, 42 N.W.2d 18, 24 (1950).

The general common law rule is that one does not owe a duty to give aid or protection to another or to warn or protect others from harm caused by a third party. *Bjerke v. Johnson*, 742 N.W.2d 660, 665 (Minn. 2007); *Becker v. Mayo Foundation*, 737 N.W.2d 200, 212 (Minn. 2007). An exception exists when there is a special relationship between the actor and the person who sustains injury, if the injury is foreseeable. *Bjerke*, 742 N.W.2d at 665; *Becker*, 737 N.W.2d at 212. A special relationship may exist where the defendant and plaintiff are in a custodial relationship. *See Bjerke*, 742 N.W.2d at 665 (defendant assumed custodial control over plaintiff who lived with her). The court in *Bjerke* noted that even if a special relationship exists, a duty may be imposed only if the injury that results was foreseeable. If "it is clear whether an incident was foreseeable, the courts decide the issue as a matter of law, but in close cases, foreseeability is reserved for the jury." 742 N.W.2d at 667–68.

In *Domagala v. Rolland*, 805 N.W.2d 14 (Minn. 2011), a case involving injuries sustained by the plaintiff in attempting to assist the defendant skid-loader operator in removing an attachment from the skid loader, the supreme court held that the failure to warn of foreseeable harm created by a defendant's conduct can constitute negligence, absent a special relationship between the parties.

CIVJIG 25.10

NEGLIGENCE AND REASONABLE CARE—BASIC DEFINITION

Definition of "reasonable care"

Reasonable care is the care a reasonable person would use in the same or similar circumstances.

Definition of "negligence"

Negligence is the failure to use reasonable care.

Ask yourself what a reasonable person would have done in these circumstances.

Negligence occurs when a person:

1. Does something a reasonable person would not do; or
2. Fails to do something a reasonable person would do.

[Foreseeability

An injury is foreseeable if a reasonable person in the same or similar circumstances would have foreseen it. The exact way an injury occurred does not have to be foreseeable.]

USE NOTE

In the case of a child, the instruction in CIVJIG 70.15, which governs the standard of care applicable to children, should be given. If the child is engaged in an adult activity, the instruction in CIVJIG 70.20 should be given, along with this instruction.

While the issue of foreseeability of an injury is usually a question of law for the court, the supreme court has stated that in close cases it is a question for the jury. **Caveat:** the bracketed language in the last paragraph should be given only in cases when the foreseeability issue presents a jury issue. It should not apply in cases involving the so-called "eggshell plaintiff" cases. *See* CIVJIG 91.41

AUTHORITIES

There are four elements of negligence: (1) the existence of a legal duty, (2) a breach of that duty, (3) proximate cause, and (4) injury. *Domagala v. Rolland*, 805 N.W.2d 14, 22 (Minn. 2011); *Louis v. Louis*, 636 N.W.2d 314, 318 (Minn. 2001); *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995); *Hudson v. Snyder Body, Inc.*, 326 N.W.2d 149, 157 (Minn. 1982); *Schmanski v. Church of St. Casimir of Wells*, 243 Minn. 289, 292, 67 N.W.2d 644, 646 (1954).

Duty turns on foreseeability. *Connolly v. Nicollet Hotel*, 254 Minn. 373, 95 N.W.2d 657, 664 (1959). If the foreseeability issue as it relates to duty is clear it will be decided by the court as a matter of law prior to submitting the case to the jury. *Domagala v. Rolland*, 805 N.W.2d 14 (Minn. 2011), *citing Alholm v. Wilt*, 394 N.W.2d 488, 491 n. 5 (Minn. 1986). In "close cases," however, the issue is for the jury. *Domagala v. Rolland*, 805 N.W.2d 14, 27 (Minn. 2011); *Bjerke v. Johnson*, 742 N.W.2d 660, 668–69 (Minn. 2007); *Whiteford ex rel. Whiteford v. Yamaha Motor Corp.*, 582 N.W.2d 916, 918 (Minn.1998). In *Doe v. Brandon*, 845 N.W.2d 174, 178 n. 2 (Minn. 2014), the supreme court noted that the cases state, "without explaining," that foreseeability as it relates to the duty issue is a question for the jury in close cases.

In *Domagala v. Rolland*, 805 N.W.2d 14 (Minn. 2011), the supreme court stated that the test for foreseeability as a threshold matter in determining duty "is not whether the precise nature and manner of the plaintiff's injury was foreseeable, but whether the possibility of an accident was clear to the person of ordinary prudence." *Id.* at 27, *citing Bjerke v. Johnson*, 742 N.W.2d 660, 667 (Minn.2007), which in turn cited *Connolly v. Nicollet Hotel*, 254 Minn. 373, 381–82, 95 N.W.2d 657, 664 (1959). The court in *Domagala* also stated that in determining if an injury was foreseeable, "we look to the defendant's conduct and ask whether it was objectively reasonable to expect the specific danger causing the plaintiff's injury, not simply whether it was within the realm of any conceivable possibility." 805 N.W.2d at 27, quoting *Whiteford ex rel. Whiteford v. Yamaha Motor Corp.*, 582 N.W.2d 916, 918 (Minn.1998). The focus is on whether it was objectively reasonable for a person of ordinary prudence to anticipate the danger. *See also Doe 169 v. Brandon*, 845 N.W.2d 174, 178 (Minn. 2014).

If the injury is foreseeable, the duty owed to the plaintiff is one of ordinary care. *See Klingbeil v. Truesdell*, 256 Minn. 360, 366, 98 N.W.2d 134, 139 (1959). The terms "ordinary care" and "reasonable care" care are used interchangeably. *See Pogalz v. Kenna*, 267 Minn. 340, 347, 126 N.W.2d 458, 463 (1964); *Geislinger v. Village of Watkins*, 269 Minn. 116, 130 N.W.2d 62 (1964); *Coenen v. Buckman Bldg. Corp.*, 278 Minn. 193, 199,153 N.W.2d 329, 335 (1967) (contributory negligence); *Quick v. Benedictine Sisters Hospital Ass'n*, 257 Minn. 470, 480, 102 N.W.2d 36, 44 (1960). The standard for determining whether a person exercised reasonable care remains the same, although the quantum of care that must be exercised will vary with the circumstances. The greater the risk, the greater the quantum of care that a reasonable person must exercise. *See Domagala v. Rolland*, 805 N.W.2d 14, 28 (Minn. 2011); *Hanson v. Christensen*, 275 Minn. 204, 205, 145 N.W.2d 868, 870 (1966); *Danielson v. Reeves*, 211 Minn. 491, 496, 1 N.W.2d 597, 599 (1941).

The standard of conduct required by the law is objective, rather than subjective. It is immaterial that a person charged with negligence thought he was acting carefully or exercising his best judgment. The legal standard of conduct is not the opinion of the individual but the conduct of an ordinarily prudent person under the circumstances. *See Olson v. Duluth, M. & I. R. Ry.*, 213 Minn. 106, 115, 5 N.W.2d 492, 496 (1942); *Peterson v. Minnesota Power & Light Co.*, 206 Minn. 268, 271, 288 N.W. 588, 589 (1939).

In civil cases, the classification of negligence into degrees, such as great, ordinary, and slight, has been discarded. *See State v. Hayes*, 244 Minn. 296, 70 N.W.2d 110 (1955).

In Minnesota "a driver with physical or mental infirmities is held to the same standard of care as any other driver and, to the extent his infirmities affect his ability to meet that standard as it relates to the accident involved, evidence concerning them may be admitted." *Richie v. Elmquist*, 283 Minn. 375, 379, 168 N.W.2d 332, 336 (1969). In a case involving a sudden loss of consciousness, however, there may be issues as to whether a driver should have anticipated that loss of consciousness, or whether the driver lost consciousness because of a seizure or simply fell asleep at the wheel. In *Kellogg v. Finnegan*, 823 N.W.2d 454 (Minn. Ct. App. 2012), the issue was whether the defendant should have anticipated that he would lose consciousness while driving. There was a factual dispute as to whether he fell asleep or suffered an unanticipated seizure. The court of appeals held that there was insufficient evidence to permit the jury to find that the driver could have foreseen he might suffer a seizure, but that there was a factual dispute as to whether he could have anticipated that he would fall asleep. The court of appeals therefore concluded that it was a jury issue as to whether he lost consciousness because of the seizure or because he fell asleep, and, if he fell asleep, whether it was foreseeable to him that he would do so.

Research References

West's Key Number Digest
Negligence ⚷233, 1720; Products Liability ⚷96

Legal Encyclopedias
C.J.S., Motor Vehicles §§ 429 to 430; Negligence §§ 34, 118 to 121, 125 to 127, 130 to 131, 133, 871 to 875, 879 to 887, 891; Products Liability §§ 206 to 217

CIVJIG 25.12

RIGHT TO ASSUME ANOTHER'S GOOD CONDUCT

Right to assume reasonable care

A person is entitled to assume that others will use reasonable care.

A person is also entitled to assume that others will obey the law.

However, a person is only entitled to assume that others will use reasonable care or will obey the law until it reasonably appears that they will not.

USE NOTE

Many of the cases involving the right to assume that others will use reasonable care are automobile accident cases. However, the concept is not limited to those cases.

AUTHORITIES

A majority of these cases arise from automobile accident litigation. *However, in Wiertzema v. Westfield Industries, Ltd.*, 1989 WL 117580 (Minn. Ct. App. 1989), rev. denied (Minn. Dec. 15, 1989), the court of appeals in an unpublished opinion rejected an argument that the instruction applies only to automobile cases.

A motorist may assume, until the contrary appears, that approaching cars will stay in their lane. *See Rome v. Rome*, 307 Minn. 207, 209, 239 N.W.2d 232, 233 (1976); *Boraas v. Carlson*, 267 Minn. 478, 484, 127 N.W.2d 439, 442 (1964); *Godeen v. Bennett*, 265 Minn. 179, 182, 120 N.W.2d 867, 870 (1963); *Cook v. Person*, 246 Minn. 119, 124, 74 N.W.2d 389, 392 (1956).

A motorist may assume that oncoming cars will respect stop signs and traffic signals. *See Wadena v. Bush*, 305 Minn. 134, 152, n. 11, 232 N.W.2d 753, 764, n. 11 (1975); *Goeden v. Thompson*, 289 Minn. 293, 296, 184 N.W.2d 8, 10 (1971); *Seivert v. Bass*, 288 Minn. 457, 465, 181 N.W.2d 888, 893 (1970); *Olson v. Anderson*, 224 Minn. 216, 219, 28 N.W.2d 66, 68 (1947). *But see Neal v. Neal*, 238 Minn. 292, 295, 56 N.W.2d 673, 676 (1953).

Once it is apparent that another driver has violated his duty to obey the law, the other driver may not rely on the assumption, but must exercise due care to avoid a collision. *See Coble v. Lacey*, 252 Minn. 423, 430, 90 N.W.2d 314, 320 (1958); *Link v. Leichtnam*, 252 Minn. 392, 396, 90 N.W.2d 518, 521 (1958); *Kapla v. Lehti*, 225 Minn. 325, 334, 30 N.W.2d 685, 691 (1948). *But see Waldstein v. Amann*, 259 Minn. 511, 515, 108 N.W.2d 215, 217–218 (1961).

Research References

West's Key Number Digest
Negligence ⚷1722

Legal Encyclopedias
C.J.S., Negligence §§ 871, 876 to 878

CIVJIG 25.14

INTOXICATION—EFFECT

Care required by an intoxicated person

If a person was intoxicated, that does not necessarily prove he or she was negligent.

However, an intoxicated person is required to use the same care required of a sober person.

USE NOTE

Involuntary intoxication requires a different instruction. See CIVJIG 45.25 for a definition of intoxication.

AUTHORITIES

A person under the influence of alcohol is required to exercise the same degree of care as a sober person. *See Kedrowski v. Czech*, 244 Minn. 111, 118, 69 N.W.2d 337, 342 (1955); *Olstad v. Fahse*, 204 Minn. 118, 121, 282 N.W. 694, 696 (1938). The fact that a person's negligent acts were due to an intoxicated condition will not absolve that person from liability. *See Sylvester v. Northwestern Hosp.*, 236 Minn. 384, 388, 53 N.W.2d 17, 20 (1952). However, involuntary intoxication is a circumstance that deprives a person of control over his conduct and should relieve the person of liability. *See* Dan B., D. Dobbs, The Law of Torts § 123 n. 1 (2000).

Where a question of contributory negligence is presented, evidence as to the intoxicated condition of the plaintiff that contributed to the plaintiff's injury is admissible. *See Kedrowski v. Czech*, 244 Minn. 111, 118, 69 N.W.2d 337, 342 (1955); *Olstad v. Fahse*, 204 Minn. 118, 121, 282 N.W. 694, 696 (1938). But unless the plaintiff's condition did in fact contribute to the plaintiff's injury, or unless the plaintiff failed to exercise the degree of care required of a sober person, the mere fact that the plaintiff was under the influence of alcohol does not in and of itself constitute contributory negligence. *See Id.*

This instruction was cited with approval in *Christensen v. Milbank Ins. Co.*, 658 N.W.2d 580, 586 (Minn. 2003).

Research References

West's Key Number Digest
Negligence ⚷239, 1720, 1745

Legal Encyclopedias
C.J.S., Negligence §§ 128 to 129, 871 to 887, 891 to 897, 899, 902

CIVJIG 25.16

EMERGENCY RULE

Reasonable care in an emergency

If there was an emergency that a person did not cause, that person is not negligent if he or she acted in a way a reasonable person would have acted. In deciding if he or she acted reasonably consider:

1. The circumstances of the emergency; and
2. What the person did or did not do.

USE NOTE

The emergency rule is simply a particularized application of the reasonable care rule. The party seeking the instruction has the burden of proving the existence of an emergency not of his or her own making. The instruction should be given where there is reasonable evidence that the pre-emergency conduct of the party seeking the instruction was not negligent.

AUTHORITIES

In *Byrns v. St. Louis County*, 295 N.W.2d 517, 519 (Minn. 1980), the supreme court stated that "an instruction on this theory should be given upon request by a party where the evidence would sustain a finding that one of the persons whose negligence will be submitted to the jury had been confronted with a sudden peril or emergency and acted under its stress."

Although the emergency doctrine has its roots in decisions dating back to *Wilson v. Northern Pacific R.R. Co.*, 26 Minn. 278, 283, 3 N.W. 333, 335 (1879), the leading case setting forth the emergency doctrine as expressed in CIVJIG 25.16 is *Johnson v. Townsend*, 195 Minn. 107, 110, 261 N.W. 859, 861 (1935):

> [O]ne, suddenly confronted by a peril, through no fault of his own, who, in the attempt to escape, does not choose the best or safest way, should not be held negligent because of such choice, unless it was so hazardous that the ordinarily prudent person would not have made it under similar conditions.

See also Byrns, 295 N.W.2d at 519; *Thielbar v. Juenke*, 291 Minn. 129, 133, 189 N.W.2d 493, 497 (1971); *Lee v. Smith*, 253 Minn. 401, 413, 92

N.W.2d 117, 126 (1958); *Kime v. Koch*, 227 Minn. 372, 376, 35 N.W.2d 534, 536 (1949); *Nicholas v. Minnesota Milk Co.*, 212 Minn. 333, 335, 4 N.W.2d 84, 85 (1942). This rule cannot be invoked by one who, through his own fault, created the emergency. *Mathews v. Mills*, 288 Minn. 16, 24, 178 N.W.2d 841, 846 (1970); *Kachman v. Blosberg*, 251 Minn. 224, 235, 87 N.W.2d 687, 695–696 (1958).

The emergency doctrine is simply a particular application of the reasonable care standard in negligence cases. As noted by the supreme court in *Brady v. Kroll*, 244 Minn. 525, 530, 70 N.W.2d 354, 358 (1955):

> This rule is merely a particular application of the reasonable care test and operates only to relieve a driver from liability for errors in judgment which the ordinarily prudent man might make under similar circumstances. Consequently, even though faced with an emergency, as was the defendant in the instant case, a driver is nevertheless obligated to make a reasonable effort to avoid a collision, and whether he uses reasonable care commensurate with the sudden peril with which he is confronted is ordinarily a question of fact for the jury.

See also Zickrick v. Strathern, 211 Minn. 329, 331, 1 N.W.2d 134, 136 (1941).

In *W.G.O. v. Crandall*, 640 N.W.2d 344 (Minn. 2002), the Minnesota Supreme Court noted that the statement of the concurring and dissenting judge in the court of appeals opinion in the case was a correct statement of the emergency rule:

> My reading of the case law suggests that there are clear objective boundaries on the district court's discretion, though in some cases they are applied without explanation. Those boundaries are these: the district court must give the emergency instruction in all cases where the jury *could find* that the defendant's pre-emergency conduct was *not* negligent, and the instruction should be refused only in those cases where the defendant's pre-emergency conduct can be said to constitute negligence as a matter of law. It is not enough that there is some evidence from which the jury could find that the defendant's pre-emergency conduct was negligent. The refusal to give the emergency instruction in such a case would require the district court to prejudge the fact question whether the defendant was negligent and would unfairly preclude the jury from considering the emergency rule even where the jury might have found that the defendant's pre-emergency actions were *not* negligent.

2001 WL 314916, at 9 (emphasis the court's) (Hanson, J., concurring in part and dissenting in part).

In *Daly v. McFarland*, 812 N.W.2d 113 (Minn. 2012), the Minnesota Supreme Court considered the applicability of the emergency rule in a case arising out of injuries sustained by the plaintiff when the defendant lost control of the snowmobile he was riding after hitting a snowdrift. Defendant pushed his snowmobile away from him, causing it to collide with the plaintiff's snowmobile. One of the issues in the case was whether the district court erred in refusing the defendant's request to instruct on the emergency rule as set out in CIVJIG 25.16.

The supreme court held that "[t]he record supports the district court's conclusion" that the defendant "did not confront a sudden peril requiring an instinctive reaction." The supreme court also concluded that even if it assumed error in the district court's failure to give the instruction, any error was harmless because the district court's general negligence instruction, coupled with the latitude given defense counsel to discuss reasonable care in closing argument, provided the jury with a basis for assessing whether the defendant's actions were reasonable under the circumstances.

Research References

West's Key Number Digest
Negligence ⚷294, 1720, 1726

Legal Encyclopedias
C.J.S., Negligence §§ 69 to 73, 871 to 875, 879 to 887, 891, 895

CIVJIG 25.35

GROSS NEGLIGENCE

Definition of "reasonable care"

Reasonable care is the care a reasonable person would use in the same or similar circumstances.

Definition of "negligence"

Negligence is the failure to use reasonable care.

Ask yourself what a reasonable person would have done in these circumstances.

Negligence occurs when a person:

Negligence is the failure to use reasonable care.

Ask yourself what a reasonable person would have done in these circumstances.

Negligence occurs when a person:

1. Does something a reasonable person would not do; or
2. Fails to do something a reasonable person would do.

Gross negligence

Gross negligence is more than just negligence. It is negligence of the highest degree.

USE NOTE

This instruction is intended for use in cases where the plaintiff has to establish the defendant's gross negligence in order to recover. The primary use will be in cases where the plaintiff brings suit against a co-employee. The Workers' Compensation Act requires proof of gross negligence in those cases. *See* Category 55, Introductory Note and CIVJIG 55.

AUTHORITIES

In addition to cases involving claims against co-employees, the gross negligence issue may also be relevant in a case where there is a disclaimer, and the plaintiff argues that the conduct constituted gross negligence to limit the impact of the disclaimer, *see Beehner v. Cragun Corp.*, 636 N.W.2d 821, 829 (Minn. Ct. App. 2001), or where there are several statutes in which liability turns on whether there is gross negligence. *E.g.*, M.S.A. § 18.78, subd. 2 (Liability of state officials for trespass liable only for "damages arising from gross negligence."); M.S.A. § 88.10, subd. 1 (no liability for customary activities in fighting wildfires, except for "damages arising out of willful or gross negligence"); M.S.A. § 604A.10 (liability of food donors limited to cases involving gross negligence).

The supreme court has defined gross negligence as "negligence in a very high degree." *High v. Supreme Lodge of the World, Loyal Order of Moose*, 214 Minn. 164, 170, 7 N.W.2d 675, 679 (Minn. 1943). The court of appeals has defined it as "negligence of the highest degree." *Ackerman v. American Family Mutual Insurance Co.*, 435 N.W.2d 835, 840 (Minn. Ct. App. 1989); *Terveer v. Norling Bros. Silo Co.*, 365 N.W.2d 279, 281 (Minn. Ct. App. 1985).

Research References

West's Key Number Digest
Negligence ⚷273, 1725

Legal Encyclopedias
C.J.S., Negligence §§ 91 to 97, 871, 885 to 887

CIVJIG 25.37

RECKLESS—DEFINED

Definition of "reckless"

A person is reckless when he or she knows or has reason to know that:

1. If he or she does act, there is a high risk of harm to another, or
2. If he or she does not act, there is a high risk of harm to another; and

proceeds to act, or fails to act, in deliberate disregard of, or indifference to that risk.

USE NOTE

The term "reckless" appears numerous times in the Minnesota Statutes and cases. However, there is no satisfactory definition of the term for civil purposes. This instruction is intended to fill that gap. This definition is taken from the Restatement (Second) of Torts.

AUTHORITIES

The Restatement (Second) of Torts § 500 (1965) defines reckless disregard of safety as follows:

> The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.
>
> Comment a describes in greater detail what this section means:
>
> Recklessness may consist of either of two different types of conduct. In one the actor knows, or has reason to know * * * of facts which create a high degree of risk of physical harm to another, and deliberately proceeds to act, or to fail to act, in conscious disregard of, or indifference to, that risk. In the other the actor has such knowledge, or reason to know, of the facts, but does not realize or

> appreciate the high degree of risk involved, although a reasonable man in his position would do so. An objective standard is applied to him, and he is held to the realization of the aggravated risk which a reasonable man in his place would have, although he does not himself have it.

The suggested jury instruction tracks the language of section 500. The primary focus in the instruction is on the deliberate disregard of a high degree of risk by a person.

In *Florenzano v. Olson*, 387 N.W.2d 168 (Minn. 1986), the Minnesota Supreme Court briefly mentioned reckless misrepresentation, although the court did not expressly recognize a cause of action for reckless representations. *See Schuler v. Meschke*, 435 N.W.2d 156 (Minn. Ct. App. 1989), rev. denied (Minn. April 19, 1989). Although the majority opinion did not recognize the claim for reckless misrepresentation, a concurring opinion by Justice Simonett noted three types of actionable fraud, one of which was reckless misrepresentation. Reckless misrepresentation was defined in the concurring opinion as occurring when "the representor asserts a fact as of his own knowledge without knowing whether it is true or false." *Florenzano*, 387 N.W.2d at 177.

In *Zutz v. Case Corp.*, 422 F.3d 764, 770 (8th Cir. 2005), the Eighth Circuit, relying on *Florenzano and Williams v. Tweed*, 520 N.W.2d 515, 517 (Minn. Ct. App. 1994), rev. denied (Minn. 1994), concluded that Minnesota had recognized a claim for reckless misrepresentation.

Research References

West's Key Number Digest
Negligence ⚷274, 1725

Legal Encyclopedias
C.J.S., Negligence §§ 104 to 105, 109, 871, 885 to 887

CIVJIG 25.40

WILLFUL CONDUCT

Willful conduct

> A person behaves willfully when he or she knows or has reason to know that an act is prohibited by a (policy) (rule) (regulation) (statute) (law) and intentionally does it anyway.

USE NOTE

This instruction is intended for use in cases involving official immunity claims. The issue of whether official immunity applies is a question of law for the court. If official immunity applies, the plaintiff's burden is to overcome that privilege by proving that the official acted willfully and maliciously. The terms "willful" and "malicious" are synonymous.

AUTHORITIES

There are two immunity issues that frequently arise in cases involving claims against the state, the state's political subdivisions, or officials of the state or its political subdivisions. Statutory immunity provides the states and its political subdivisions with immunity from liability for discretionary decisions that involve policy-making factors. Official immunity protects the individual official from liability. In addition, vicarious official immunity also protects the state or political subdivision from being held vicariously liable when the individual official is held to be immune from suit because of official immunity.

The issue of whether government entities and public officials are protected under those immunities is a question of law for the court. *Vasallo v. Majeski*, 842 N.W.2d 456, 462 (Minn. 2014); *Gleason v. Metropolitan Council Transit Operations*, 582 N.W.2d 216, 219 (Minn. 1998); *Johnson v. State*, 553 N.W.2d 40, 45 (Minn. 1996); *Snyder v. City of Minneapolis*, 441 N.W.2d 781, 786 (Minn. 1989).

Statutory immunity protects policy making activities that are legislative or executive in nature, if they are made at the planning level. In general, conduct at the operational level is not protected. *Johnson v. State*, 553 N.W.2d 40, 46 (Minn. 1996). Under the official immunity doctrine, however, "a public official charged by law with duties which call for the exercise of his judgment or discretion is not personally liable to an individual for damages unless he is guilty of a willful or malicious wrong." *Id., citing Elwood v. County of Rice*, 423 N.W.2d 671, 677 (Minn.

1988). *See also Vasallo v. Majeski*, 842 N.W.2d 456, 462 (Minn. 2014); *Anderson v. Anoka Hennepin Independent School Dist. 11*, 678 N.W.2d 651, 655 (Minn. 2004).

Official immunity protects decision-making at the operational, rather than the planning level. It requires more than performance of ministerial duties by the public official. The supreme court has defined a ministerial duty as one that is "absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts." *Johnson*, 553, N.W.2d at 46, *citing Cook v. Trovatten*, 200 Minn. 221, 224, 274 N.W. 165, 167 (1937).

The supreme court has applied official immunity in a wide variety of cases to protect public officials from suit. *E.g., Vasallo v. Majeski*, 842 N.W.2d 456 (Minn. 2014) (police officer's decision to turn off siren in entering an intersection while answering call); *Anderson v. Anoka Hennepin Independent School Dist. 11*, 678 N.W.2d 651 (Minn. 2004) (school teacher's decision with respect to saw safety guard in shop class made according to school protocol and protected by official immunity); *Sletten v. Ramsey County*, 675 N.W.2d 291 (Minn. 2004) (official immunity applied to failure warn claims against county employees involved in operation of compose site); *Watson v. Metropolitan Transit Comm'n*, 553 N.W.2d 406 (Minn. 1996) (bus driver's decision not to use intercom system during an altercation among passengers or stopping the bus); *Johnson v. State*, 553 N.W.2d 40 (Minn. 1996) (actions of state and county agents in failing to determine whether a parolee had reported to a halfway house or to immediately obtain an arrest warrant); *Pletan v. Gaines*, 494 N.W.2d 38 (Minn. 1992) (decision to engage in a high-speed chase). However, official immunity does not apply in all cases where discretion is exercised by public officials. *See Terwilliger v. Hennepin County*, 561 N.W.2d 909, 913 (Minn. 1997) (day-to-day treatment decisions involving a psychiatric patient are not immune from tort liability).

The purpose of official immunity is to protect public officials "from the fear of personal liability that might deter independent action." *Elwood v. Rice County*, 423 N.W.2d 671, 678 (Minn. 1988). Official and statutory immunity are similar, although there are distinctions:

> [O]fficial immunity applies only in situations involving the act of an individual state official. In contrast, statutory immunity protects the government as an entity. The two immunities can also obviously operate in concert. Take the example of a high state official sued for her actions carrying out the policies of the state that employs her—the official might be entitled to official immunity, while the state might benefit from statutory immunity * * * . Also, discretion has a broader meaning in the contact of official immunity * * * By way of analogy: statutory immunity protects what might be termed policy judgment (which may take into account competing policy factors) * * * while official immunity protects more individual, professional judgment (wherein the judgment necessarily

> reflects the factors of a situation and the professional goal—for example, criminal apprehension) * * * .
>
> This analogy merely emphasizes the fact that the common origin of and overlap between these two concepts has made sharp distinctions difficult. For example, in both official and statutory immunity, courts must distinguish actions that merit immunity from those that do not. To do so, courts have separated actions that involve discretionary acts or policy making from those which simply effectuate a decision or policy. The latter have been labeled "ministerial" and "operational," while the former are termed "planning" and "discretionary." Whether in official or statutory immunity, actions involving policy development or other exercise of discretion are generally immune * * * .

Janklow v. Minnesota Board of Examiners for Nursing Home Administrators, 552 N.W.2d 711, 716 (Minn. 1996) (citations omitted). *See also Sletten v. Ramsey County*, 675 N.W.2d 291, 314 (Minn. 2004). A ministerial duty is one that is "absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts." *Wiederholt v. City of Minneapolis*, 581 N.W.2d 312, 315 (Minn. 1998) (*quoting Cook v. Trovatten*, 200 Minn. 221, 224, 274 N.W. 165, 167 (1937) (citation omitted)). *See also Anderson v. Anoka Hennepin Independent School Dist. 11*, 678 N.W.2d 651, 656 (Minn. 2004).

Official immunity is lost if the official acted willfully or maliciously. In the official immunity context, willful and malicious are synonymous. *State by Beaulieu v. City of Mounds View*, 518 N.W.2d 567, 571 (Minn. 1994). Malice in the context of official immunity means intentionally committing an act that the official has reason to believe is legally prohibited. *Vasallo v. Majeski*, 842 N.W.2d 456, 465 (Minn. 2014); *Anderson v. Anoka Hennepin Independent School Dist. 11*, 678 N.W.2d 651, 662 (Minn. 2004); *Kelly v. City of Minneapolis*, 598 N.W.2d 657, 663 (Minn. 1999); *State by Beaulieu v. City of Mounds View*, 518 N.W.2d 567, 571 (Minn. 1994). The issue of whether an officer acted willfully or maliciously is usually a question of fact to be resolved by the jury. *Kelly v. City of Minneapolis*, 598 N.W.2d 657, 664 n.5 (Minn. 1999); *Johnson v. Morris*, 453 N.W.2d 31, 42 (Minn. 1990); *Elwood v. County of Rice*, 423 N.W.2d 671, 679 (Minn. 1988).

Research References

West's Key Number Digest
Negligence ⚷275, 1725

Legal Encyclopedias
C.J.S., Negligence §§ 98 to 103, 106 to 113, 871, 885 to 887

CIVJIG 25.45

VIOLATIONS OF NONTRAFFIC STATUTES

Legal duties

A person has certain legal duties that are written into law as statutes.

If a person breaks a law, [except a traffic law,] he or she is negligent.

[This is true unless he or she has a valid excuse.]

I will read (a) (some) law(s) to you.

If I read a law, it does not automatically mean that this law has been broken. This decision is up to you.

[If a law has been broken, then you must decide if it was a direct cause of the accident.]

USE NOTE

This instruction is intended for use in cases involving the violation of non-traffic statutes. The impact of a statutory violation may vary, depending on the type of statute involved. In each case, the statute and judicial interpretations must be examined to determine the effect of the statute. The violation of some statutes is negligence *per se* unless justification or excuse is established. In other cases, the violation is negligence per se, but no excuse or justification will be permitted. In cases involving the violation of so-called "exceptional" statutes, the statutory violation may preclude the assertion of the defenses of contributory negligence or secondary assumption of risk.

In certain situations, it may be necessary for the trial judge by instruction to define "justification or excuse." In those situations, it is suggested that Restatement (Second) of Torts § 288A (1965) be examined and the criteria set forth therein be considered in formulating a definition.

In cases where there is a specific remedy provided for the violation of a statute, this instruction should not be used. In those cases, the instruction and special verdict form should be drafted to parallel the statutory language giving rise to the claim.

In cases involving of traffic statutes, CIVJIG 65.25 should be given.

In cases involving violations of the Uniform Building Code, the instruction will have to be modified. *See Gradjelick v. Hance*, 646 N.W.2d 225 (Minn. 2002); *Bills v. Willow Run I Apartments*, 547 N.W.2d 693 (Minn. 1996). In those cases, the jury will have to be instructed that it must find that the landowner knew or should have known of the UBC violation and failed to take reasonable steps to remedy the violation.

AUTHORITIES

Absent a valid excuse or justification, *see Mechler v. McMahon*, 184 Minn. 476, 480, 239 N.W. 605, 607 (1931), violation of a statute or ordinance that imposes a standard of conduct designed to protect the general public or a particular class of persons is negligence *per se*, unless the statute or ordinance expressly designates the breach as only prima facie evidence of negligence. *Butler v. Engel*, 243 Minn. 317, 322, 68 N.W.2d 226, 230 (1954); *Lavalle v. Kaupp*, 240 Minn. 360, 363–364, 61 N.W.2d 228, 230 (1953); *Barrett v. Nash Finch Co.*, 228 Minn. 156, 159, 36 N.W.2d 526, 528 (1949). The effect of the negligence per se doctrine is merely to substitute the statutory standard of care for that of the common law standard of the ordinarily prudent man. *See Lynghaug v. Payte*, 247 Minn. 186, 193, 76 N.W.2d 660, 665 (1956); *Lavalle v. Kaupp*, 240 Minn. 360, 363, 61 N.W.2d 228, 230 (1953); *Hutchinson v. Cotton*, 236 Minn. 366, 368, 53 N.W.2d 27, 28 (1952). The rule applies to statutes and ordinances, *Pacific Indemnity Co. v. Thompson-Yaeger, Inc.*, 260 N.W.2d 548, 559 (Minn. 1977), and regulations, *Alderman's Inc. v. Shanks*, 536 N.W.2d 4, 7 (Minn. 1995); *Femrite v. Abbott Northwestern Hospital*, 568 N.W.2d 535, 539 (Minn. Ct. App. 1997), rev. denied (Minn. Nov. 18, 1997).

For the statute or ordinance to apply, the plaintiff must be a member of the class protected by the statute or ordinance, and the plaintiff must sustain an injury resulting from a hazard the statute or ordinance was designed to avoid. *Alderman's Inc. v. Shanks*, 536 N.W.2d 4, 8 (Minn. 1995); *Hage v. Stade*, 304 N.W.2d 283, 286 (Minn. 1981); *Cracraft v. St. Louis Park*, 279 N.W.2d 801, 806 (Minn. 1979); *Pacific Indemnity Co. v. Thompson-Yaeger, Inc.*, 260 N.W.2d 548, 558 (Minn. 1977); *Scott v. Independent School Dist.*, 256 N.W.2d 485, 488–489 (Minn. 1977). Where the statute or ordinance is not directly applicable as the standard of conduct, violation is ordinarily not even considered to be relevant evidence on the issue of whether the violator has acted as a reasonably prudent person. However, under some circumstances the fact of the violation may still be accepted as relevant evidence bearing upon the conduct of a reasonable person in the violator's position. *Illinois Farmers Ins. Co. v. Tapemark Co.*, 273 N.W.2d 630, 636–638 (Minn. 1978); Restatement (Second) of Torts § 288B cmt. d (1965). Whether the statute or ordinance in question was enacted for the benefit of the party seeking to invoke it is a matter of law. *See Mechler v. McMahon*, 184 Minn. 476, 480, 239 N.W. 605, 607 (1931). It is usually for the jury to determine whether the statute was violated, whether there was a sufficient justification or excuse, and whether the violation proximately caused the result. *See Anderson v. Enfield*, 244 Minn. 474, 477, 70 N.W.2d 409, 412 (1955); *Spencer v. Johnson*, 203 Minn. 402, 407, 281 N.W. 879, 882 (1938).

In *Bills v. Willow Run I Apartments*, 547 N.W.2d 693, 694 (Minn. 1996), the supreme court limited the doctrine of negligence per se in cases involving violations of the Uniform Building Code. In those cases, a landlord or owner is not negligent per se unless "(1) the landlord or owner knew or should have known of the Code violation; (2) the landlord or owner failed to take reasonable steps to remedy the violation; (3) the injury suffered was the kind the Code was meant to prevent; and (4) the violation was the proximate cause of the injury or damage." In *Gradjelick v. Hance*, 646 N.W.2d 225 (Minn. 2002), the supreme court clarified the impact of its opinion in *Bills*. The court held that its decision in *Bills*, which established a negligence per se standard for Uniform Building Code violations, was not intended to limit the availability of common law negligence claims against landlords:

> (1) *Bills* articulated a standard for negligence per se based on UBC violations; (2) *Bills* did not create a unified standard such that allegations of code violation must be analyzed only under negligence per se; and (3) analyses under negligence per se according to *Bills* and ordinary common law negligence are both available in landlord liability cases when UBC violations are alleged.

Id. at 234.

The actual or constructive knowledge required to establish negligence per se claims for UBC violations does not appear to be applicable in other negligence per se cases. *See Rosenau v. Peterson*, 147 Minn. 95, 97, 179 N.W. 647, 648 (1920) (ignorance of statute is not an excuse).

Certain statutes, such as the Minnesota Highway Traffic Regulation Act, expressly provide that a violation of its provisions is only prima facie evidence of negligence. *See* M.S.A. § 169.96. It merely shifts the burden of going forward with the evidence. *See Nees v. Minneapolis St. Ry. Co.*, 218 Minn. 532, 536, 16 N.W.2d 758, 761 (1944).

A statutory breach may establish fault on the part of both defendants and plaintiffs. *See Mechler v. McMahon*, 184 Minn. 476, 479, 239 N.W. 605, 607 (1931).

In an action based on violation of a statutory duty, contributory negligence is available as a defense, *see Dart v. Pure Oil Co.*, 223 Minn. 526, 533, 27 N.W.2d 555, 559 (1947), unless the statute indicates a legislative intent to exclude the defense. *E.g., La Belle v. Swanson*, 248 Minn. 35, 78 N.W.2d 358 (1956); *Standafer v. First National Bank*, 236 Minn. 123, 52 N.W.2d 718 (1952); *Seim v. Garavalia*, 306 N.W.2d 806, 810 (Minn. 1981); *Zerby v. Warren*, 297 Minn. 134, 140, 210 N.W.2d 58, 62 (1973); *Mayes v. Byers*, 214 Minn. 54, 7 N.W.2d 403 (1943); *Schutt v. Adair*, 99 Minn. 7, 9, 108 N.W. 811, 812 (1906).

The breach of certain "exceptional" statutes may result in the imposition of strict or absolute liability. *Seim v. Garavalia*, 306 N.W.2d 806, 811 (Minn. 1981). Strict liability may be imposed because the statute is intended to protect a limited class of persons who may be unable to protect themselves. *See Zerby v. Warren*, 297 Minn. 134, 139, 210 N.W.2d 58, 62 (1973). In such cases, the defenses of contributory negligence and assumption of the risk will be unavailable. *Id.*; *Thelen v. St. Cloud Hosp.*, 379 N.W.2d 189, 193 (Minn. Ct. App. 1985) (Vulnerable Adults Act). Strict liability may also be imposed where the legislature intends to make the person breaching a statute liable without regard to fault. *Seim v. Garavalia*, 306 N.W.2d 806, 810 (Minn. 1981). Such statutes may also restrict the available defenses. Neither type of statute should be affected by the Comparative Fault Act, M.S.A. § 604.01. *Seim v. Garavalia,* 306 N.W.2d at 812.

The supreme court has been reluctant to imply private causes of action that did not exist at common law for statutory violations, "where the legislature has not either by the statute's express terms or by implication provided for civil tort liability." *Bruegger v. Faribault County Sheriff's Dep't*, 497 N.W.2d 260, 262 (Minn. 1993) (no common law cause of action for failure to inform individuals of potential rights of recovery under the Crime Victims Reparations Act); *Doe v. Brainerd International Raceway, Inc.*, 533 N.W.2d 617, 620–21 (Minn. 1995) (no action based on statute prohibiting use of minors in sexual performances; statute later amended to provide a cause of action); *Haage v. Steies*, 555 N.W.2d 7, 9–10 (Minn. Ct. App. 1996) (no legislative intent to create cause of action for violation of entertainment agency licensing statute).

Research References

West's Key Number Digest
Negligence 🔑222, 238, 1732

Legal Encyclopedias
C.J.S., Negligence §§ 38, 115, 134 to 138, 140 to 147, 871

CIVJIG 25.46

COMPLIANCE WITH STATUTE

Compliance with legal duty

There is evidence in this case that (plaintiff) (defendant) followed a legal duty written into law as a statute.

It is not conclusive proof of reasonable care if you find that (plaintiff) (defendant) followed such a legal duty.

It is only evidence of reasonable care.

Consider this evidence along with all the other evidence when you decide if reasonable care was used.

USE NOTE

This instruction is intended for use in cases where there is evidence that the plaintiff or defendant complied with a statute, ordinance, or administrative regulation. Compliance with the standard is not conclusive on the issue of reasonable care but is evidence of reasonable care.

AUTHORITIES

A statutory standard "is no more than a minimum, and it does not necessarily preclude a finding that the actor was negligent in failing to take additional precautions." *Blasing v. P.R.L. Hardenbergh Co.*, 303 Minn. 41, 49, 226 N.W.2d 110, 115 (1975). Compliance is not conclusive proof of due care, *Blatz v. Allina Health System*, 622 N.W.2d 376, 385 (Minn. Ct. App. 2001), but it is evidence of due care. *Leisy v. Northern Pacific Railway*, 230 Minn. 61, 65, 40 N.W.2d 626, 629 (1950); *Hellman v. Julius Kolesar, Inc.*, 399 N.W.2d 654, 655 (Minn. Ct. App. 1987); *Steinbrecher v. McLeod Co-op. Power Ass'n*, 392 N.W.2d 709, 712 (Minn. Ct. App. 1986).

Research References

West's Key Number Digest
Negligence ⚷233, 1720

Legal Encyclopedias
C.J.S., Negligence §§ 34, 118 to 121, 125 to 127, 130 to 131, 133, 871 to 875, 879 to 887, 891

CIVJIG 25.47

EVIDENCE OF CUSTOM

Evidence of standards or custom

Evidence of standards or custom is not conclusive. It is just one piece of evidence.

1. You may consider an (industrial) (professional) standard to decide whether reasonable care was used.

2. You may consider what is usually done or customary in this (industry) (profession) to decide whether reasonable care was used.

Consider this evidence along with all the other evidence when you decide if reasonable care was used.

USE NOTE

Evidence of custom must meet relevancy standards. For example, evidence of custom may be evidence that a party had notice or should have had notice of a particular practice, or that implementation of the practice was feasible. This instruction is intended for use in cases where custom is in issue. It is intended to avoid any overemphasis the jury might place on the evidence.

AUTHORITIES

Evidence of industry standards and custom in the industry is admissible on the issue of whether the defendant, or plaintiff, exercised reasonable care. *See Jenson v. Touche Ross & Co.*, 335 N.W.2d 720, 727 (Minn. 1983); *Cornfeldt v. Tongen*, 262 N.W.2d 684, 704 (Minn. 1977); *Boland v. Garber*, 257 N.W.2d 384, 386 (Minn. 1977); *Schmidt v. Beninga*, 285 Minn. 477, 489–490, 173 N.W.2d 401, 408 (1970); *Hartmon v. National Heater Co.*, 240 Minn. 264, 277, 60 N.W.2d 804, 812 (1953); *Kelly v. Southern Minnesota R. Co.*, 28 Minn. 98, 99, 9 N.W. 588, 588 (1881); Dan B. Dobbs, Law of Torts § 163 (2000); Restatement (Second) of Torts § 295A (1965).

The observance of a custom or the failure to observe it does not necessarily amount to reasonable care or the lack of it, but it is admissible because it tends to show what a reasonably prudent person would do under the same or similar circumstances. *See Schmidt v. Beninga*, 285 Minn. 477, 489–490, 173 N.W.2d 401, 408 (1970); *Hartmon v. National Heater Co.*, 240 Minn. 264, 277, 60 N.W.2d 804, 812 (1953). Industry custom is not conclusive. *See Edgewater Motels, Inc. v. Gatzke*, 277 N.W.2d 11, 18 (Minn. 1979). However, a negligent act will not be excused by the fact that it is customary. *See Tiemann v. Independent School Dist. No. 740*, 331 N.W.2d 250, 251 (Minn. 1983); *Scattergood v. Keil*, 233 Minn. 340, 343, 45 N.W.2d 650, 653 (1951). Under some circumstances, the industry custom may itself be negligent. *See Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727 (Minn. 1980), cert. denied, 449 U.S. 921, 101 S.Ct. 320, 66 L.Ed.2d 149 (1980).

Research References

West's Key Number Digest
Negligence 🔑236, 1720

Legal Encyclopedias
C.J.S., Negligence §§ 61 to 63, 124, 871 to 875, 879 to 887, 891

CIVJIG 25.48

SUBSEQUENT REMEDIAL MEASURES

Evidence of change or repair

Evidence in this case shows that the (product) (condition of the property) (cause of the injury) was (changed) (repaired) after the alleged (harm) (accident) (injury).

You can consider a (repair) (change) made to the (product) (property) (cause of the injury) only to decide:

1. [Whether (defendant) owned the property in question.]
2. [Whether (defendant) controlled the property in question.]
3. [The cost and ease of making the (repair) (change).]
4. [Impeachment.]

You cannot use this evidence to decide:

1. [Whether (defendant) acted reasonably under the circumstances.]
2. [Whether (defendant) manufactured a product in a defective condition unreasonably dangerous to the user, consumer, or his or her property.]

USE NOTE

Evidence of subsequent remedial measures must first meet relevancy standards. If relevant, there still may be questions concerning the admissibility of such evidence. *See* Minn.R.Evid., Rule 407. This instruction is intended to avoid undue emphasis on the evidence when it is admitted.

If the evidence is used to impeach a defendant's testimony, the fourth bracketed sentence, which provides for the use of the evidence for impeachment purposes, will have to be tailored to the facts of the case. *See* CIVJIG 12.25.

AUTHORITIES

Rule 407 of the Minnesota Rules of Evidence governs the admissibility of subsequent remedial measures. Following the 2006 amendment, it reads as follows:

> When, after an injury or harm allegedly caused by an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

The 2006 amendment added language, first, providing that a remedial measure protected by the rule must follow the injury or harm; and second, clarifying that the rule is applicable regardless of the legal theory advanced at trial. The Committee Comment regarding the 2006 amendments states:

> The amendment comes from Fed. R. Evid. 407, which was added in 1997. The amending language makes it clear that to merit protection under the rule the remedial measure must come after the accident or injury. This approach is consistent with current practice in Minnesota. *See Myers v. Hearth Techs., Inc.,* 621 N.W.2d 787, 792 (Minn. Ct. App. 2001) (finding changes made before the accident do not qualify as subsequent remedial measures); *Beniek v. Textron, Inc.*, 479 N.W.2d 719, 723 (Minn. Ct. App. 1992) (finding that design changes after plaintiff purchased the product, but before the accident, are not excluded by this rule).
>
> In addition, the language insures that the protection under the rule does not depend on the legal theory advanced at trial. The Minnesota Supreme Court has already ruled that subsequent remedial measures are not admissible to prove defect in design defect cases. *See Kallio v. Ford Motor Co.*, 407 N.W.2d 92, 97–98 (Minn. 1987). The 1989 Minnesota Supreme Court Advisory Committee Comment to rule 407 provided that subsequent remedial measures "are also inadmissible in failure to warn cases in view of *Bilotta v. Kelly Co. Inc.*, 346 N.W.2d 616 (Minn. 1984) which held that design defect and failure to warn cases can be submitted to the jury on a single theory of products liability." The amended language would also make subsequent remedial measures inadmissible to prove that a product was defective in a pure strict liability or a breach of warranty case.

Research References

West's Key Number Digest

Evidence 🔑219.55(2); Negligence 🔑1720; Products Liability 🔑96

Legal Encyclopedias

C.J.S., Evidence § 387; Motor Vehicles §§ 429 to 430; Negligence §§ 871 to 875, 879 to 887, 891; Products Liability §§ 206 to 217

CIVJIG 25.50

RES IPSA LOQUITUR

Events speak for themselves

From the events of the accident, you may find that (defendant) was negligent.

You may do this if you find that:

1. This accident was of a kind that, in the ordinary course of events, would not have happened if (defendant) had used reasonable care; and

2. (Defendant) was responsible for a (force) (instrument) (agency) (condition) that was the direct cause of the (accident) (injury); and

3. The (force) (instrument) (agency) (condition) that caused the (accident) (injury) was not substantially due to actions of (plaintiff) (some third person).

If all of these elements have been proved, then you may or may not find that (defendant)'s negligence caused the (accident) (injury).

USE NOTE

Regarding the appropriateness of giving CIVJIG 25.50 and CIVJIG 25.55 (no inference of negligence from the fact of the accident alone), *see* CIVJIG 25.55.

The trial judge must initially determine whether the inference may reasonably be drawn by the jury, or whether the inference must necessarily be drawn. When the plaintiff makes a prima facie case for res ipsa, the instruction must be given. The jury determines whether the inference should be drawn if different conclusions can reasonably be reached. Restatement (Second) of Torts § 328D (1965).

In many cases, it is apparent that the accident would not occur absent someone's negligence. In such a case, element (1) should not be left to the jury's decision; rather, the trial judge should decide as a matter of law and instruct the jury that the accident is of a nature that would not occur absent negligence. On the other hand, many cases involve serious questions of whether the accident was of a type that would not have happened absent negligence. Decision on the question then must be left to the jury. In deciding whether to give this issue to the jury, the trial judge must examine the nature of the product or entity involved, as well as the possible conflicting evidence.

When instructing on the doctrine of res ipsa loquitur, the trial judge should carefully examine the evidence and the nature of the instrumentality or agency that caused the accident, and leave for jury decision only questions on elements about which there is a fact dispute or doubt, and on whether different conclusions could reasonably be reached on the inference.

AUTHORITIES

There are three requirements necessary for application of the res ipsa loquitur doctrine:

> (1) The event must be of a kind that ordinarily does not occur in the absence of someone's negligence;
>
> (2) It must be caused by an agency or instrumentality within the exclusive control of the defendant; and
>
> (3) It must not have been due to any voluntary action or contribution on the part of the plaintiff.

Hoven v. Rice Memorial Hospital, 396 N.W.2d 569, 572 (Minn. 1986); *Spannaus v. Otolaryngology Clinic*, 308 Minn. 334, 337, 242 N.W.2d 594, 596 (1976); *Warrick v. Giron*, 290 N.W.2d 166, 169 (Minn. 1980); *Weiby v. Wente*, 264 N.W.2d 624, 629 (Minn. 1978); *Fleming v. Hallum*, 350 N.W.2d 417, 419 (Minn. Ct. App. 1984); *Stelter v. Chiquita Processed Foods, L.L.C.*, 658 N.W.2d 242, 246 (Minn. Ct. App. 2003). There are other, similar, formulations of the doctrine. *E.g., Johnson v. Coca Cola Bottling Co.*, 235 Minn. 471, 476, 51 N.W.2d 573, 576 (1952); *Young v. Caspers*, 311 Minn. 391, 398, 249 N.W.2d 713, 717 (1977); *Risberg v. Duluth M. & I. R. Ry. Co.*, 233 Minn. 396, 407, 47 N.W.2d 113, 118 (1951), cert. denied, 342 U.S. 832, 72 S.Ct. 40, 96 L.Ed. 630 (1951), reh. denied, 342 U.S. 895, 72 S.Ct. 198, 96 L.Ed. 670 (1951). When the plaintiff makes a prima facie case for res ipsa, the instruction must be given. *Stelter v. Chiquita Processed Foods*, 658 N.W.2d 242, 247 (Minn. Ct. App. 2003); *Stearns v. Plucinski*, 482 N.W.2d 496, 498 (Minn. Ct. App. 1992), rev. denied (Minn. Apr. 29, 1992).

When the defendant relies upon an explanation in order to avoid application of the *res ipsa* doctrine, and the facts of the defendant's explanation are such that the jury may reject them, the jury should be instructed as to the law of res ipsa loquitur to be applied in the event that they reject defendant's explanation. *Heath v. Wolesky*, 181 Minn. 492, 493, 233 N.W. 239, 240 (1930).

Control is not necessarily control exercised at the time of the injury, but may be the control exercised at the time of the negligent act that subsequently resulted in the injury. The reason is that in many instances, the defendant's failure to use reasonable care will not manifest itself until a later time. *Johnson v. Coca Cola Bottling Co.*, 235 Minn. 471, 477, 51 N.W.2d 573, 577 (1952); *Holkestad v. Coca-Cola Bottling Co. of Minnesota*, 288 Minn. 249, 255, 180 N.W.2d 860, 864 (1970) (strict liability); *Peterson v. Minnesota Power & Light Co.*, 207 Minn. 387, 390, 291 N.W. 705, 707 (1940).

If an unexplained accident could with equal probability have resulted from causes not within the control of the defendant, the doctrine of res ipsa loquitur is inapplicable. *Olson v. St. Joseph's Hosp.*, 281 N.W.2d 704, 708 (Minn. 1979). When the injury might with equal probability have resulted from the acts of others as well as from the acts of the defendant, res ipsa loquitur is inapplicable unless the plaintiff proves facts, other than that of the injury, from which the defendant's negligence can be inferred. *Collings v. Northwestern Hosp.*, 202 Minn. 139, 144, 277 N.W. 910, 912 (1938), approved in *Olson v. St. Joseph's Hosp.*, 281 N.W.2d 704, 708 (Minn. 1979). However, the possibility that several parties might have contributed to an accident or injury will not prevent the application of res ipsa loquitur to one of those parties, if the single party's duty can be defined so as to include responsibility for the acts of the other parties. *Mahowald v. Minnesota Gas Co.*, 344 N.W.2d 856, 863 (Minn. 1984). The exclusive control requirement should not be rigidly applied. Rather, it should be seen as a flexible term. *Id.*

The requirement that the event must not have been due to any voluntary action or contribution on the part of the plaintiff is related to the exclusive control requirement. *Warrick v. Giron*, 290 N.W.2d 166, 169 (Minn. 1980); *Spannaus v. Otolaryngology Clinic*, 308 Minn. 334, 337, 242 N.W.2d 594, 596 (1976); *Fleming v. Hallum*, 350 N.W.2d 417 (Minn. Ct. App. 1984). However, distinctions should be drawn between cases in which the plaintiff's conduct with respect to the instrumentality in question may have at least in part caused the instrumentality in issue to cause the accident or injury, and cases in which the plaintiff acted negligently but the plaintiff's conduct had nothing to do with the instrumentality that caused the accident or injury. In the latter case, *res ipsa loquitur* should still be applicable, and the plaintiff's negligence, if any, should be considered in the comparative fault question. As stated in W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on the Law of Torts § 39 (5th ed. 1984):

> Nor should this element of the doctrine preclude its application where the defendant's probable negligence consisted in a failure to protect the plaintiff from hurting himself. Moreover, the advent of comparative fault should logically eliminate this element from the doctrine, unless the plaintiff's negligence would appear to be the sole proximate cause of the event, since comparative fault by its nature converts the plaintiff's contributing fault from its traditional function of barring liability into one of merely reducing damages.

If the plaintiff's negligence is such that it will not preclude the inference of negligence on the part of the defendant, but is rather a contributing cause to the injury, the third element of the instruction should not be given. Rather, plaintiff's negligence should be considered under the Comparative Fault Act, M.S.A. § 604.01.

Res ipsa loquitur permits an inference of negligence but does not compel it. *Mahowald v. Minnesota Gas Co.*, 344 N.W.2d 856, 864 (Minn. 1984); *Barnes v. Northwest Airlines, Inc.*, 233 Minn. 410, 430, 47 N.W.2d 180, 192 (1951). *Res ipsa loquitur* does not shift the burden of proof. *Mahowald,* 344 N.W.2d at 864; *Ryan v. St. Paul Union Depot Co.*, 168 Minn. 287, 289, 210 N.W. 32, 32 (1926). It simply gets the matter to the jury under an appropriate instruction. *Mahowald,* 344 N.W.2d at 864; *Lee v. Crookston Coca-Cola Bottling Co.*, 290 Minn. 321, 331, 188 N.W.2d 426, 434 (1971); *Holkestad v. Coca-Cola Bottling Co.*, 288 Minn. 249, 253, 180 N.W.2d 860, 864 (1970). The plaintiff has the burden of persuasion, even though the defendant introduces no evidence by way of explanation. *Sullivan v. Minneapolis St. Ry.*, 161 Minn. 45, 55, 200 N.W. 922, 926 (1924).

In *Ybarra v. Spangard*, 25 Cal.2d 486, 154 P.2d 687 (1944), the California Supreme Court applied res ipsa loquitur in a medical malpractice case against multiple defendants, even though the plaintiff was unable to identify the instrumentality that caused his injury. In *Hoven*, the supreme court held that "it is unnecessary at this time for us to address such a proposed dramatic change in our medical negligence law except to note that to this date this court has not adopted the *Ybarra* analysis," which would place the burden on the defendants to show how plaintiff's injury occurred, and that the injury was caused by no negligence on the part of any team member. 396 N.W.2d at 572–73.

In *Leuer v. Johnson*, 450 N.W.2d 363 (Minn. Ct. App. 1990), rev. denied (Minn. March 16, 1990), the plaintiff was shot by one of two hunters who fired in his direction, but he was unable to identify which hunter fired the shot that hit him. The court of appeals concluded that the trial court correctly granted summary judgment against the plaintiff on the res ipsa loquitur issue:

> Because the doctrine of res ipsa loquitur cannot be invoked unless all three of its elements are present, appellant's inability to establish the second element of "exclusive control" renders moot the question of whether his conduct contributed to the accident.

Id. at 366. The court rejected the argument that the California Supreme Court's decision in *Summers v. Tice*, 33 Cal.2d 80, 199 P.2d 1 (1948), which involved similar facts, should be applied. The court concluded that although the facts are similar, "because the Summers decision had as its basis *Ybarra*, and because *Ybarra* has been consistently rejected by the Minnesota Supreme Court, we must reject Summers as well." 450 N.W.2d at 365.

The court in *Leuer* also took note of the supreme court's opinion in

Mahowald v. Minnesota Gas Co., 344 N.W.2d 856 (Minn. 1984), in which the supreme court shifted the burden of proof to the defendants in a gas explosion case, where the instrumentality that caused the harm could not readily be identified or was not exclusively in the control of one of the defendants in the case. The *Leuer* court noted that *Mahowald* was limited in scope and has subsequently been applied only in another gas explosion case, *Spinett, Inc. v. Peoples Natural Gas Co.*, 385 N.W.2d 834 (Minn. Ct. App. 1986).

Allegations of specific acts of negligence will not preclude the application of *res ipsa loquitur*. *Young v. Caspers*, 311 Minn. 391, 397 n. 2, 249 N.W.2d 713, 716, n. 2 (1977); *Kleinman v. Banner Laundry Co.*, 150 Minn. 515, 519, 186 N.W. 123, 125 (1921). However, if the cause of the accident is known and is not in issue, *res ipsa loquitur* does not apply. *Okrina v. Midwestern Corp.*, 282 Minn. 400, 402, 165 N.W.2d 259, 261 (1969); *Johnson v. West Fargo Mfg. Co.*, 255 Minn. 19, 25–26, 95 N.W.2d 497, 502 (1959); *Zitzow v. Wal-Mart Stores, Inc.*, 568 N.W.2d 549, 551 (Minn. Ct. App. 1997), rev. denied (Minn. Oct. 31, 1997).

In *Stearns v. Plucinski*, 482 N.W.2d 496 (Minn. Ct. App. 1992), rev. denied (Minn. April 29, 1992), the court of appeals held that it was not error for the trial court to use both the res ipsa loquitur instruction, along with a pattern instruction stating that negligence may not be inferred from the fact of the accident alone. In *Orwick v. Belshan*, 304 Minn. 338, 231 N.W.2d 90 (1975), the supreme court said that "Except where the doctrine of res ipsa loquitur is involved, this admonition [contained in former JIG 99, now CIVJIG 25.55] is almost routinely given in negligence cases. It is a proper cautionary instruction which has to do with the burden of proof rather than unavoidable accident." *Orwick*, 304 Minn. at 348, 231 N.W.2d at 97, quoting *Kuether v. Locke*, 261 Minn. 41, 51, 110 N.W.2d 539, 546–547 (1961). The issue in the two supreme court cases was whether JIG 99 [now CIVJIG 25.55] concerned the burden of proof, rather than the doctrine of unavoidable accident.

The court in *Stearns* said that: "We do not interpret this dictum as meaning that the res ipsa loquitur instruction can never be given with JIG 99 [now CIVJIG 25.55]. We hold that the instructions given in this case conveyed to the jury a correct statement of the law." 482 N.W.2d at 499.

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West's Key Number Digest
Negligence 🔑1579, 1611, 1723

Legal Encyclopedias
C.J.S., Negligence §§ 710, 716, 719, 745, 749 to 769, 871, 876 to 878

CIVJIG 25.52

RES IPSA LOQUITUR AND SPECIFIC NEGLIGENCE AS ALTERNATIVE THEORIES

[The Committee recommends no instruction.]

AUTHORITIES

The doctrine of res ipsa loquitur may be invoked under a general allegation of negligence, coupled with an allegation of specific acts of negligence. *Young v. Caspers*, 311 Minn. 391, 397, n. 2, 249 N.W.2d 713, 716, n. 2 (1977); *Anderson v. Eastern Minn. Power Co.*, 197 Minn. 144, 150, 266 N.W. 702, 705 (1936). The plaintiff does not lose the benefit of the *res ipsa* doctrine by attempting to prove specific acts of negligence. *Okrina v. Midwestern Corp.*, 282 Minn. 400, 402, 165 N.W.2d 259, 261 (1969); *Segal v. Bloom Bros. Co.*, 249 Minn. 367, 373, 82 N.W.2d 359, 364 (1957).

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Legal Encyclopedias
C.J.S., Negligence §§ 744 to 748, 754 to 756, 871, 876 to 878

CIVJIG 25.55

FACT OF ACCIDENT ALONE—NO INFERENCE OF NEGLIGENCE

The fact that a (collision) (accident) (event) has happened does not by itself mean that someone was (negligent) (at fault).

USE NOTE

This is a standard instruction that relates to the burden of proof issue. The supreme court has stated in dictum that it is routinely given, except in res ipsa loquitur cases. The court of appeals has specifically held that it is not error to give both this instruction and an instruction on res ipsa loquitur in the same case.

AUTHORITIES

Negligence is not to be presumed. Mere proof of the happening of an accident is not enough to establish negligence or its causal relation. *See Lenz v. Johnson*, 265 Minn. 421, 424, 122 N.W.2d 96, 99 (1963); *Forde v. Northern Pac. Ry.*, 241 Minn. 246, 253, 63 N.W.2d 11, 18 (1954); *State v. Paskewitz*, 233 Minn. 452, 461, 47 N.W.2d 199, 204 (1951). It is error not to give the jury instruction on pure accident where the evidence shows a strong possibility of no negligence on the part of any party. *See Lestico v. Kuehner*, 204 Minn. 125, 132, 283 N.W. 122, 127 (1938).

On the question of whether or not this instruction should be given when res ipsa loquitur is applicable, *see Orwick v. Belshan*, 304 Minn. 338, 348, 231 N.W.2d 90, 97 (1975) (cautionary instruction proper, except where doctrine of res ipsa loquitur is involved). However, in *Stearns v. Plucinski*, 482 N.W.2d 496, 498 (Minn. Ct. App. 1992), rev. denied (Minn. April 29, 1992), the court of appeals held that it was not error to give this instruction along with res ipsa loquitur, characterizing the court's statement in *Orwick* as dictum not intended to preclude the use of both instructions in all cases.

In *Kuether v. Locke*, 261 Minn. 41, 51, 110 N.W.2d 539, 546–547 (1961), the court noted that the instruction "is almost routinely given in negligence cases. It is a proper cautionary instruction which has to do with the burden of proof rather than unavoidable accident." *See also Orwick v. Belshan,* 304 Minn. at 348, 231 N.W.2d at 97; *Whelan v. Gould*, 259 Minn. 203, 206, 106 N.W.2d 893, 895 (1960).

Research References

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C.J.S., Negligence §§ 710, 716, 719, 871, 876 to 878

SPECIAL VERDICT FORMS

CIVSVF 25.90

LIABILITY OF STATE OR MUNICIPALITY FOR ACT OF OFFICIAL—OFFICIAL IMMUNITY IN ISSUE

1. [Was (defendant) negligent?] [Did (defendant) commit a battery on (plaintiff?)]

____
Yes or No

2. *If your answer to Question 1 was "Yes," then answer this question*: Was this [negligence] [battery] a direct cause of (plaintiff's) injuries?

____
Yes or No

3. *If your answer to Question 2 was "Yes," then answer this question*: Did (defendant) act willfully in causing (plaintiff's) injuries?

____
Yes or No

USE NOTE

This special verdict form is intended for use in cases in which official immunity is in issue. The official immunity issue may arise in cases where the plaintiff's claim is based on an intentional tort or negligence. The first question is bracketed to reflect those two possibilities. There may be multiple claims for battery as well. *E.g., Johnson v. Morris*, 453 N.W.2d 31 (Minn. 1990). If so, the form will have to be adjusted to accommodate the additional counts. There are other intentional tort theories that could be included as well, depending on the circumstances of the case. If the plaintiff's theory is negligence, there may also be an issue of whether the plaintiff was contributorily negligent. If so, the appropriate questions from CIVSVF 28.90 should be added.

The special verdict questions and their supporting jury instructions are as follows:

1. CIVJIG 25.10: Negligence
2. CIVJIG 27.10: Direct Cause
3. CIVJIG 25.40: Willful Conduct

AUTHORITIES

The application of statutory immunity and official immunity are questions of law for the court. *E.g., Gleason v. Metropolitan Council Transit Operations*, 582 N.W.2d 216, 219 (Minn. 1998); *Johnson v. State*, 553 N.W.2d 40, 45 (Minn. 1996); *Snyder v. City of Minneapolis*, 441 N.W.2d 781, 786 (Minn. 1989).

Whether the official acted willfully is usually a question of fact for the jury. *E.g., Johnson v. Morris*, 453 N.W.2d 31, 42 (Minn. 1990); *Elwood v. Rice County*, 423 N.W.2d 671, 679 (Minn. 1988); *Soucek v. Banham*, 503 N.W.2d 153, 160 (Minn. Ct. App. 1993).

CATEGORY 27

CAUSATION

Table of Instructions

CIVJIG 27.10 Direct Cause
CIVJIG 27.15 Concurring Cause
CIVJIG 27.20 Superseding Cause

CIVJIG 27.10

DIRECT CAUSE

Definition of "direct cause"

> A "direct cause" is a cause that had a substantial part in bringing about the (collision) (accident) (event) (harm) (injury).

USE NOTE

This definition is to be used alone only when the jury issue involves the question of whether or not a cause was in fact a direct cause of the result.

If concurring cause is involved, CIVJIG 27.15 should be given immediately following this definition.

If superseding cause is an issue, CIVJIG 27.20 must be given immediately following this definition.

AUTHORITIES

Courts typically use "proximate cause" to denote the need for limitation on legal liability.

> Courts have always used the tort doctrine of proximate cause, as distinguished from causation in fact, to implement public policy in establishing the parameters of liability. Thus this court has frequently quoted Prosser's statement that, "[a]s a practical matter, legal responsibility must be limited to those causes which are so

> close to the result, or of such significance as causes, that the law is justified in imposing liability. This limitation is not a matter of causation, it is one of policy * * * ." Prosser, The Minnesota Court on Proximate Cause, 21 Minn.L.Rev. 19, 22 (1937) * * * .

Lewellin v. Huber, 465 N.W.2d 62, 65 (Minn. 1991).

In *Christianson v. Chicago, St. P., M. & O. Ry.*, 67 Minn. 94, 97, 69 N.W. 640, 641 (1896), the supreme court established the standard proximate cause rule for Minnesota:

> Consequences which follow in unbroken sequence, without an intervening efficient cause, from the original negligent act, are natural and proximate; and for such consequences the original wrongdoer is responsible, even though he could not have foreseen the particular results which did follow.

There must be some adjective to qualify the word "cause" to show the differences between causes in a philosophical sense that have no legal significance, and those causes that are legally significant. "Direct cause" has been selected rather than "proximate cause." "Proximate" is a term that may be meaningful to lawyers because of familiarity with the concept, but it is not so understood by jurors. "Proximate" often confuses, rather than enlightens, the trier of fact. *Staloch v. Belsaas*, 271 Minn. 315, 327–28, 136 N.W.2d 92, 100 (1965); *Gardner v. Germain*, 264 Minn. 61, 65–66, 117 N.W.2d 759, 762 (1962); *Strobel v. Chicago, R.I. & Pac. R.R. Co.*, 255 Minn. 201, 204–207, 96 N.W.2d 195, 198–200 (1959); W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on the Law of Torts § 42 (5th ed. 1984).

The Minnesota Supreme Court has applied the "substantial factor" test advocated by the Restatement (Second) of Torts § 431 (1965) to determine whether a cause is "direct." *See, e.g., Flom v. Flom*, 291 N.W.2d 914, 917 (Minn. 1980); *Lestico v. Kuehner*, 204 Minn. 125, 133, 283 N.W. 122, 127 (1938); *Peterson v. Fulton*, 192 Minn. 360, 364, 256 N.W. 901, 903 (1934). Under the "substantial factor" test, negligent conduct is the direct cause of harm to another if it is a substantial factor in bringing about the harm. *See* Restatement (Second) of Torts § 431 (1965). *See also Kronzer v. First Nat'l Bank of Minneapolis*, 305 Minn. 415, 426, 235 N.W.2d 187, 194 (1975); *Mickelson v. Kernkamp*, 230 Minn. 448, 458, 42 N.W.2d 18, 24 (1950).

The basic definition of direct cause must be immediately followed by the definition of superseding cause (*see* CIVJIG 27.20) in every case where the issues involve an intervening cause that may possibly relieve the original wrongdoer of legal liability. In *Orwick v. Belshan*, 304 Minn. 338, 349–350, 231 N.W.2d 90, 97–98 (1975), the supreme court stated that the pattern instruction on direct cause affords an accurate and much simpler definition than the *Christianson* definition, and, when used in conjunction with CIVJIG 27.15, covering concurring cause, and CIVJIG 27.20, covering superseding cause, it provides a preferable means of submitting the issue of causation to the jury.

As defined in the instruction, causation is generally a jury issue. *See Norberg v. Northwestern Hospital Ass'n, Inc.*, 270 N.W.2d 271, 274 (Minn. 1978); *Frey v. Montgomery Ward & Co.*, 258 N.W.2d 782, 787 (Minn. 1977); *Ramirez v. Miska*, 304 Minn. 4, 7, 228 N.W.2d 871, 873 (1975); *Vanderweyst v. Langford*, 303 Minn. 575, 576, 228 N.W.2d 271, 272 (1975); *Meurer v. Junkermeier*, 291 Minn. 318, 320, 191 N.W.2d 416, 417 (1971).

In *George v. Estate of Baker*, 724 N.W.2d 1, 10–11 (Minn. 2006), the Minnesota Supreme Court discussed the standard for determining causation in Minnesota:

> Minnesota applies the substantial factor test for causation. The negligent act is a direct, or proximate, cause of harm if the act was a substantial factor in the harm's occurrence. 4 Minn. Dist. Judges Ass'n, Minnesota Practice—Jury Instruction Guides, Civil, CIVJIG 27.10 (4th ed.1999); Restatement (Second) of Torts § 431 (1965). Factual, or but-for, causation is insufficient to establish liability in Minnesota because "[i]n a philosophical sense, the causes of an accident go back to the birth of the parties and the discovery of America." William L. Prosser, The Minnesota Court on Proximate Cause, 21 Minn. L.Rev. 19, 22 (1936). But-for causation, however, is still necessary for substantial factor causation because if the harm would have occurred even without the negligent act, the act could not have been a substantial factor in bringing about the harm. Restatement (Second) of Torts § 432 (1965); *Draxton v. Katzmarek,* 203 Minn. 161, 164–65, 280 N.W. 288, 290 (1938) ("If the accident * * * would have happened even if there had been an absence of excessive speed, such speed was not a material element or substantial factor in bringing it about and hence not a proximate cause."). The classic test for determining factual cause is to compare what actually happened with a hypothetical situation identical to what actually happened but without the negligent act. W. Page Keeton, et al., Prosser and Keeton on the Law of Torts § 41, at 265 (5th ed.1984).

Research References

West's Key Number Digest

Automobiles ⚷201(1.1); Negligence ⚷380, 1741

Legal Encyclopedias

C.J.S., Motor Vehicles §§ 511 to 513, 603, 717 to 718, 1299; Negligence §§ 193 to 194, 871, 888 to 890, 898, 903

CIVJIG 27.15

CONCURRING CAUSE

Definition of "concurring cause"

There may be more than one direct cause of the (collision) (accident) (event) (harm) (injury).

This occurs if the effects of:

[the (negligence) (fault) of each of two or more persons]

[the (negligence) (fault) of a person and a force of nature]

work at about the same time to cause the (collision) (accident) (event) (harm) (injury).

If this occurs, each may be a direct cause of the (collision) (accident) (event) (harm) (injury).

USE NOTE

This instruction should be given immediately after CIVJIG 27.10 if there is no issue regarding superseding cause. If superseding cause is in issue, this instruction should be given after CIVJIG 27.10 and should contain one of the bracketed portions of the instruction. CIVJIG 27.20 will then follow CIVJIG 27.15.

AUTHORITIES

Concurring causes are direct (proximate) causes that act contemporaneously or so nearly together that the chain of causation is not broken, and together cause the injury that would not have resulted in the absence of either one. *Roemer v. Martin*, 440 N.W.2d 122, 123, n. 1 (Minn. 1989); *Haugen v. Dick Thayer Motor Co.*, 253 Minn. 199, 91 N.W.2d 585 (1958); *Frank v. Stiegler*, 250 Minn. 447, 455, 84 N.W.2d 912, 918 (1957). "Before a particular factor can be said to be a concurrent cause, it must, first of all, be established that it is a cause." *Roemer*, 440 N.W.2d at 123. If there are concurrent acts of negligence, both parties are liable unless the resulting damage is "clearly separable." *See Mathews v. Mills*, 288 Minn. 16, 21, 178 N.W.2d 841, 844 (1970).

Under some circumstances, the failure to give CIVJIG 27.15 may not be prejudicial error. *See Smith v. Kahler Corp., Inc.*, 297 Minn. 272, 280–281, 211 N.W.2d 146, 152–153 (1973). *But see Byrns v. St. Louis County*, 295 N.W.2d 517, 520 (Minn. 1980) ("in a case where each party charges the other with negligence directly causing an accident, an instruction on concurring cause should be given").

Where the negligence of each of two defendants combines together and contributes concurrently as direct causes of an injury, the common law rule was that each was liable for the whole, although one may have contributed in greater degree to the injury. *Frank v. Stiegler*, 250 Minn. 447, 455, 84 N.W.2d 912, 918 (1957); *see Mathews v. Mills*, 288 Minn. 16, 20–21, 178 N.W.2d 841, 844 (1970). That result was not changed under the comparative negligence statute in 1969. *See Maday v. Yellow Taxi Co.*, 311 N.W.2d 849, 850 (Minn. 1981); *Ruberg v. Skelly Oil Co.*, 297 N.W.2d 746, 751–52 (Minn. 1980).

The rule of joint and several liability was continued in the Comparative Fault Act in 1978, *see* M.S.A. § 604.02, subd. 1, but was modified by a new rule providing for loss reallocation in the event a defendant's share of the judgment is "uncollectible." The modified rule required all remaining parties who were at fault, including the plaintiff, to bear the burden of uncollectibility of a share of a judgment, in relationship to their respective percentages of fault. *See* M.S.A. § 604.02, subd. 2. In products liability cases, the uncollectible share of a judgment of a party in the chain of distribution and manufacture was reallocated only to th e remaining parties in the chain. *See* M.S.A. § 604.02, subd. 3.

Other amendments to the Comparative Fault Act limited the liability of certain parties based on their percentage of fault, but those limitations were abolished by the legislature in 2003, when it amended M.S.A. § 604.02, subd. 1, to read as follows:

> Subdivision 1. [JOINT LIABILITY.] When two or more persons are severally liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that the following persons are jointly and severally liable for the whole award:
>
> (1) a person whose fault is greater than 50%;
>
> (2) two or more persons who act in a common scheme or plan that results in injury;
>
> (3) a person who commits an intentional tort; or
>
> (4) a person whose liability arises under chapters 18B—pesticide control, 115—water pollution control, 115A—waste management, 115B—environmental response and liability, 115C—leaking underground storage tanks, and 299J—pipeline safety, public nuisance law for damage to the environment or the public health, any other environmental or public health law, or any environmental or public health ordinance or program of a municipality as defined in section 466.01.

The reallocation rules under the Comparative Fault Act continue to apply, subject to certain limitations. *See* Staab v. Diocese of St. Cloud, ______ N.W.2d ______ (Minn. 2014) (no reallocation to party who is only severally liable).

Concurring causes can arise from innocent, negligent, intentionally wrongful, or criminal conduct of third persons. *See* Restatement (Second) Torts § 439 (1965).

An act of God can combine with an act of negligence to produce concurring causes. *See Swanson v. La Fontaine*, 238 Minn. 460, 468, 57 N.W.2d 262, 267 (1953); *Sauer v. Rural Cooperative Power Ass'n*, 225 Minn. 356, 361, 31 N.W.2d 15, 17 (1948). An act of God resulting from a force of nature that is unexpected and unforeseeable and could not have been prevented by the exercise of reasonable care will not be a concurring cause. Rather, it will be the sole cause of the accident. *See Vanden Broucke v. Lyon County*, 301 Minn. 399, 406, 222 N.W.2d 792, 796 (1974).

If two causes unite to cause injury that either alone would also have caused, and one of the causes is a result of the defendant's negligence, he may be held liable for the injury because each is a "direct cause," although they are not concurring but are rather coinciding causes. *See Anderson v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 146 Minn. 430, 440–441, 179 N.W. 45, 49 (1920); Restatement (Second) of Torts § 432(2) (1965).

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C.J.S., Motor Vehicles §§ 515, 603, 673 to 674; Negligence §§ 66 to 68, 202 to 211, 315, 871, 888 to 890, 898, 903

CIVJIG 27.20

SUPERSEDING CAUSE

Definition of "superseding cause"

However, a cause is not a direct cause when there is a superseding cause.

A cause is a superseding cause when four conditions are present:

1. It happened after the original (negligence) (fault); and
2. It did not happen because of the original (negligence) (fault); and
3. It changed the natural course of events by making the result different from what it would have been; and
4. The original wrongdoer could not have reasonably anticipated this event.

USE NOTE

This instruction must be given immediately after the definition of direct cause or concurring cause in all cases where the facts present an issue of an intervening cause that may be a superseding cause.

This instruction can be used only in cases involving non-intentional torts. *See* Restatement (Second) of Torts § 279 (1965).

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An intervening cause is a superseding cause if four elements are satisfied:

> (1) its harmful effects must have occurred after the original negligence; (2) it must not have been brought about by the original negligence; (3) it must have actively worked to bring about a result which would not otherwise have followed from the original negligence; and (4) it must not have been reasonably foreseeable by the original wrongdoer.

Canada v. McCarthy, 567 N.W.2d 496, 507 (Minn. 1997); *Wartnick v. Moss & Barnett*, 490 N.W.2d 108, 113 (Minn. 1992); *Rieger v. Zackoski*, 321 N.W.2d 16, 21 (Minn. 1982); *Kroeger v. Lee*, 270 Minn. 75, 78, 132 N.W.2d 727, 729–730 (1965).

Superseding cause is generally defined as "an act * * * , in no way caused by the defendant's negligence, or a force of nature, occurring after defendant's negligent act or omission and operating as an independent force to produce the injury." *Hafner v. Iverson*, 343 N.W.2d 634, 637 (Minn. 1984); *Medved v. Doolittle*, 220 Minn. 352, 357, 19 N.W.2d 788, 791 (1945), overruled on other grounds, *Strobel v. Chicago R.I. & Pac. R.R. Co.*, 255 Minn. 201, 207, n. 5, 96 N.W.2d 195, 200, n. 5 (1959). The doctrine of superseding cause is related to the doctrine of direct cause (proximate cause) (*see* CIVJIG 27.10), in that it breaks the chain of causation set in operation by the original act of negligence and insulates the original negligent actor from liability. *See Sowada v. Motzko*, 256 Minn. 395, 399–400, 98 N.W.2d 182, 185–186 (1959); *Medved v. Doolittle*, 220 Minn. 352, 356–357, 19 N.W.2d 788, 790 (1945). The original act of negligence is eliminated as a direct cause and becomes merely an "occasion" or "condition." *See Seward v. Minneapolis St. Ry. Co.*, 222 Minn. 454, 456–457, 25 N.W.2d 221, 223 (1946).

In order for an intervening force to be a superseding cause, it must not only come between the original cause and the injury in point of time, but it must turn aside the natural sequence of events and produce a result that would not otherwise have followed. *Gillespie v. Great Northern Ry. Co.*, 124 Minn. 1, 7, 144 N.W. 466, 468 (1913). *Accord, Sporna v. Kalina*, 184 Minn. 89, 93–94, 237 N.W. 841, 843 (1931). A negligent act or omission cannot constitute a superseding cause where it occurs so near in time of the happening of the accident that, in the remaining time interval, it did not have sufficient time either to stop or break the natural sequence and progression of the original tortfeasor's negligence as a direct cause. *See Thelen v. Spilman*, 251 Minn. 89, 96, 86 N.W.2d 700, 705–706 (1957); *Lee v. Lee*, 248 Minn. 496, 499–500, 80 N.W.2d 529, 533 (1957). As a general rule, a willful, malicious, or criminal act breaks the chain of causation and is a superseding cause. *See Anderson v. Theisen*, 231 Minn. 369, 372, 43 N.W.2d 272, 274 (1950). However, where the criminal or intentional act is foreseeable and can be prevented, liability may be imposed. *See Ponticas v. K.M.S. Investments*, 331 N.W.2d 907, 912 (Minn. 1983); *Illinois Farmers Ins. Co. v. Tapemark Co.*, 273 N.W.2d 630, 635, 636 (Minn. 1978); *Vermes v. American Dist. Tel. Co.*, 312 Minn. 33, 42, 251 N.W.2d 101, 105–106 (1977).

The same foreseeability standard applies in determining whether an act of God is a superseding cause. The act of God must be an event resulting from a force of nature, unexpected and unforeseeable, and the sole cause of an accident, so that the exercise of reasonable care could not have prevented the harm. *See Vanden Broucke v. Lyon County*, 301 Minn. 399, 405–406, 222 N.W.2d 792, 796 (1974).

Forces caused or set in motion by the original tortfeasor are not considered as intervening, since they proceed directly from his conduct, and he is charged with their results. *See Carlson v. Fredsall*, 228 Minn. 461, 467–468, 37 N.W.2d 744, 748 (1949); *Purcell v. St. Paul City Ry. Co.*, 48 Minn. 134, 138, 50 N.W. 1034, 1034–1035 (1892). Nor are foreseeable intervening forces that are normal responses to the stimulus of the original act to be considered superseding causes. *See Knutson v. Nielsen*, 256 Minn. 506, 514, 99 N.W.2d 215, 220–221 (1959); *Crawford v. Woodrich Const. Co.*, 239 Minn. 12, 24, 57 N.W.2d 648, 655 (1953); *Ferraro v. Taylor*, 197 Minn. 5, 7–9, 265 N.W. 829, 831–832 (1936).

A jury instruction that defines direct cause, but ignores the element of superseding cause where factually in issue is inaccurate. *See Carlson v. Fredsall*, 228 Minn. 461, 473–474, 37 N.W.2d 744, 751 (1949).

The doctrine of superseding cause is applicable in favor of a plaintiff on an issue of contributory negligence. *See Seward v. Minneapolis St. Ry. Co.*, 222 Minn. 454, 457, 25 N.W.2d 221, 223 (1946).

The Minnesota Supreme Court has affirmed the principles in superseding cause instruction on several occasions. *See Ruberg v. Skelly Oil Co.*, 297 N.W.2d 746, 750 (Minn. 1980); *Regan v. Stromberg*, 285 N.W.2d 97, 100 (Minn. 1979); *Sandhofer v. Abbott-Northwestern Hosp.*, 283 N.W.2d 362, 368, n. 2 (Minn. 1979).

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CATEGORY 28

COMPARATIVE FAULT, DEFENSES, AND JOINT AND SEVERAL LIABILITY

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INTRODUCTORY NOTE

The Comparative Fault Act, M.S.A. §§ 604.01–.02, defines the kinds of fault and the circumstances under which fault is subject to comparison. M.S.A. § 604.01, subd. 1, provides for the comparison of fault in cases involving death, personal injury, property damage, and economic loss:

> **Subdivision 1.** Contributory fault does not bar recovery in an action by any person or the person's legal representative to recover damages for fault resulting in death, or in injury to person or property, or in economic loss, if the contributory fault was not greater than the fault of the person against whom recovery is sought, but any damages allowed must be diminished in proportion to the amount of fault attributable to the person recovering. The court may, and when requested by any party shall, direct the jury to find separate special verdicts determining the amount of damages and the percentage of fault attributable to each party; and the court shall then reduce the amount of damages in proportion to the amount of fault attributable to the person recovering.

M.S.A. § 604.01, subd. 1 (2014).

The term “fault” is defined in subdivision 1a of section 604.01:

> **Subd. 1a.** “Fault” includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an express consent or primary assumption of risk, misuse of a product and unreasonable failure to avoid an injury or to mitigate damages, and the defense of complicity under section 340A.801. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault. The doctrine of last clear chance is abolished.
>
> Evidence of unreasonable failure to avoid aggravating an injury or to mitigate damages may be considered only in determining the damages to which the claimant is entitled. It may not be considered in determining the cause of an accident.

The defenses included in the definition of “fault” in subdivision 1a include contributory negligence (“acts or omissions that are in any measure negligent or reckless”); secondary assumption of risk (“unreasonable assumption of risk not constituting an express consent or primary assumption of risk”); “misuse of a product”; “unreasonable failure to avoid an injury or to mitigate damages”; and complicity.

1. Contributory Negligence. Contributory negligence is the failure of the plaintiff to exercise reasonable care. *Cormican v. Parsons*, 282 Minn. 94, 96, 163 N.W.2d 41, 44 (1968); *Employers Mutual Ins. Co. v. Oakes Manufacturing Co.*, 356 N.W.2d 719, 723 (Minn. Ct. App. 1984).

In cases where the plaintiff asserts only a negligence theory, as in a motor vehicle accident case, it should be sufficient to instruct the jury according to CIVJIG 25.10, the basic negligence instruction. In cases where the plaintiff's theory is other than negligence, or is a theory that necessitates a more refined application of the basic negligence principle, such as in cases involving fraudulent misrepresentation, it may be appropriate to give CIVJIG 28.15.

The definition of “fault” in the Comparative Fault Act does not sweep aside all exceptions to defenses that existed prior to the enactment of the Act. For example, in cases involving legislation intended to protect a specific class of persons, or legislation that has limited the available defenses in an action based upon that legislation, contributory negligence may not be available as a defense, the Comparative Fault Act notwithstanding. *E.g., Seim v. Garavalia*, 306 N.W.2d 806, 812 (Minn. 1981) (contributory negligence not a defense to a violation of M.S.A. § 347.22, the leash law); *Zerby v. Warren*, 297 Minn. 134, 140–41, 210 N.W.2d 58, 62–63 (1973) (neither contributory negligence nor assumption of risk permitted as defenses to a violation of statute prohibiting the sale of toxic glue to minors, where illegal sale made to minor resulted in death of another minor).

It may also be inappropriate to permit the assertion of the defense of contributory negligence in cases where it is inconsistent with the defendant's common law duty. *E.g., Sandborg v. Blue Earth County*, 615 N.W.2d 61, 64 (Minn. 2000) (court noted that contributory negligence applies in most special relationship cases, but that it did not in a jailer-detainee case "in which the duty to protect against a known possibility of self-inflicted harm transfers entirely to the jailer, and comparing the fault of the detainee is therefore not appropriate"); *Tomfohr v. Mayo Foundation*, 450 N.W.2d 121, 125 (Minn. 1990) (in a case involving suicide of the plaintiff's decedent, the supreme court, in answer to a certified question from the United States District Court for the District of Minnesota, held that it was not error as a matter of law to submit a capacity based instruction to the jury; the court held that where the hospital undertook to protect the decedent because of the potential for suicide, it would be inconsistent to permit the defendant to assert the defense of contributory negligence).

Children are held to the standard of care of a reasonable child of like age, intelligence, training, and experience. *Toetschinger v. Ihnot*, 312 Minn. 59, 65, 250 N.W.2d 204, 208 (1977). A child engaged in certain adult activities will be held to an adult standard of care. *Dellwo v. Pearson*, 259 Minn. 452, 458, 107 N.W.2d 859, 863 (1961) (child operating an automobile, airplane, or powerboat); *Huebner v. Koelfgren*, 519 N.W.2d 488, 490 (Minn. Ct. App. 1994) (teenager handling a gun). The instructions governing a child's standard of care is in CIVJIG 70.15. The instruction governing a child engaged in an adult activity is in CIVJIG 70.20.

The negligence of a parent is not imputed to the parent's child and will not bar a child from recovering for injuries sustained through the negligence of a third party. *See Peterson v. Richfield Plaza, Inc.*, 252 Minn. 215, 89 N.W.2d 712 (1958); *Ewing v. George Benz & Sons*, 224 Minn. 508, 28 N.W.2d 733 (1947); *Forseth v. Duluth-Superior Transit Co.*, 202 Minn. 447, 278 N.W. 904 (1938). However, the parent's negligence will bar the parent's separate claim for damages arising out of injury to the child. *See Hondl v. Chicago Great Western Ry. Co.*, 249 Minn. 306, 82 N.W.2d 245 (1957); *Mattson v. Minnesota & N.W. Ry. Co.*, 98 Minn. 296, 108 N.W. 517 (1906). The child's negligence will bar the claim of the child and the separate claim of the parent.

Where the negligence of parent and child are involved, there should not be separate instructions on contributory negligence, where the only claims involved are negligence claims.

2. Assumption of Risk. Assumption may be broken into two forms, primary and secondary. Primary assumption of risk relates to the duty issue and is not an affirmative defense subject to comparison. Secondary assumption of risk is an aspect of contributory negligence and, as such, is subject to comparison under the Comparative Fault Act.

a. *Primary Assumption of Risk*. "[P]rimary assumption of risk" is not apportionable fault, pursuant to M.S.A. § 604.01, subd. 1a. Rather,primary assumption of risk is a complete bar to recovery. *See Grisim v. TapeMark Charity Pro-Am Golf Tournament*, 415 N.W.2d 874 (Minn. 1987). If the plaintiff has assumed the risk in the primary sense, the defendant owes no duty to the plaintiff. *Rieger v. Zackoski*, 321 N.W.2d 16, 23 (Minn. 1982); *Griffiths v. Lovelette Transfer Co., Inc.*, 313 N.W.2d 602, 605 (Minn. 1981); *Armstrong v. Mailand*, 284 N.W.2d 343, 348 (Minn. 1979); *Swagger v. Crystal*, 379 N.W.2d 183, 185 (Minn. Ct. App. 1985). However, if there are fact questions that will be determinative of the duty issue, those fact questions may be submitted to the jury. *Griffiths,* 313 N.W.2d at 605. *But see Louis v. Louis*, 636 N.W.2d 314, 321–22 n. 8 (Minn. 2001), in which the Minnesota Supreme Court indicated that the primary assumption of risk issue would be resolved by the jury, after the trial court determined that the defendant owed a duty to the plaintiff, where there were genuine issues of material fact concerning the issue.

The doctrine of primary assumption of the risk applies "only where the parties have voluntarily entered a relationship in which plaintiff assumes well-known, incidental risks. As to these risks, the defendant has no duty to protect the plaintiff and, thus, if the plaintiff's injury arises from an incidental risk, the defendant is not negligent." *Wagner v. Thomas J. Obert Enterprises*, 396 N.W.2d 223, 226 (Minn. 1986), *citing Olson v. Hansen*, 299 Minn. 39, 44, 216 N.W.2d 124, 127 (1974). Primary assumption of risk has been implied "mainly in the context of sporting events and other naturally risky activities." *Wagner*, 396 N.W.2d at 236. *Also see Jussila v. United States Snowmobile Ass'n*, 556 N.W.2d 234 (Minn. Ct. App. 1996), rev. denied (Minn. Jan. 29, 1997) (snowmobile association not responsible for injuries to spectator at snowmobile races, where there were sufficient safe places for spectators to view the event).

More recent Minnesota appellate court decisions have indicated that primary assumption of risk should apply only to a limited set of cases, primarily those involving inherently dangerous sporting events. In *Daly v. McFarland*, 812 N.W.2d 113 (Minn.2012), the court rejected the defendant's argument that primary assumption of risk should apply in a case involving injuries sustained by an experienced snowmobile operator in an accident with another operator. The court noted that "[t]he doctrine commonly applies to participants and spectators of inherently dangerous sports," but that it has been applied in products liability cases. *Id.* at 120 and 120 n. 1. The court of appeals rejected a defense argument that primary assumption of risk applied to a premises liability accident in *Renswick v. Wenzel*, 819 N.W.2d 198, 205 (Minn. Ct. App.2012), noting that "[a] finding of primary assumption of risk is a rare thing in Minnesota." In *Eischen v. Crystal Valley Co-op.*, 835 N.W.2d 629, 635 (Minn. Ct. App. 2013), a farm accident arising out of the use of a crop sprayer, the court of appeals noted that " '[o]ne of the few instances where primary assumption of risk applies is in cases involving patrons of inherently dangerous sporting events,' " (*quoting*

Wagner v. Thomas J. Obert Enters., 396 N.W.2d 223, 226 (Minn.1986)). The court in *Eischen* nonetheless proceeded to consider its potential application, but held that the issue could not be decided as a matter of law. In *Schneider ex rel. Schneider v. Erickson*, 654 N.W.2d 144, 149 (Minn. Ct. App. 2002), the court of appeals noted that "Minnesota courts rarely apply primary assumption of the risk, and have found that its application is only appropriate under limited circumstances."

Primary assumption of risk is also the basis for the firefighter's rule. *Lang v. Glusica*, 387 N.W.2d 895, 900 (Minn. Ct. App. 1986); *Armstrong v. Mailand*, 284 N.W.2d 343, 348 (Minn. 1979). The rule shields a defendant from liability for injuries sustained by a participant, where the act that causes the injury is one which the officer should have reasonably expected to occur while engaged in the duty that brought him or her to the scene. *See id.* Whether a risk is expected or hidden from or unanticipated by a firefighter or police officer requires an examination of the particular facts of each case. *Johnson v. Miller*, 371 N.W.2d 94 (Minn. Ct. App. 1985), appeal after remand, 388 N.W.2d 26 (1986). However, a person who "materially enhances the risk or creates a new risk of harm" by his or her active negligence will not be shielded by the firefighter's rule if an officer sustains injury. *See id.*

M.S.A. § 604.06 contains a specific limitation on the fireman's rule:

> The common law doctrine known as the fireman's rule shall not operate to deny any peace officer, as defined in section 626.84, subdivision 1, clause (c), or public safety officer, as defined in section 299A.41, subdivision 4, a recovery in any action at law or authorized by statute.

b. *Secondary Assumption of Risk.* In *Springrose v. Willmore*, 292 Minn. 23, 192 N.W.2d 826 (1971), the Minnesota Supreme Court merged the defenses of contributory negligence and secondary assumption of the risk. The court stated that "[t]he only question for submission in the usual case, we think, will be whether the particular plaintiff was, under the circumstances negligent in regard to his own safety, for under that general issue counsel may fully argue that issue in all its respects." *Id.* at 26, 192 N.W.2d at 828. Because of the merger of secondary assumption of risk and contributory negligence, it will ordinarily be inappropriate to separately instruct the jury on assumption of risk. *See Thompson v. Hill*, 366 N.W.2d 628 (Minn. Ct. App. 1985); *Isker v. Gardner*, 360 N.W.2d 468 (Minn. Ct. App. 1985). While the definition of "fault" in section 604.01, subdivision 1a, includes secondary assumption of risk, it does not mandate separate submission of the defenses listed in that subdivision.

Secondary assumption of risk must be distinguished from primary assumption of risk. If there is primary assumption of risk, the defendant is not liable to the plaintiff, and the defense issue will not arise. *See Griffiths v. Lovelette Transfer Co.*, 313 N.W.2d 602, 605 (Minn. 1981); *Armstrong v. Mailand*, 284 N.W.2d 343, 348 (Minn. 1979); *Beckman v. V.J.M. Enterprises, Inc.*, 269 N.W.2d 37, 39 (Minn. 1978).

3. Product Misuse. Product misuse is a defense only because a plaintiff misusing a product is negligent in doing so. As such, the defense of product misuse should also be merged into the defense of contributory negligence. While the supreme court has not taken a specific position on the application of the defense of "misuse," in cases involving negligence claims product misuse has been treated as a facet of contributory negligence. *See Johnson v. West Fargo Mfg., Co.*, 255 Minn. 19, 95 N.W.2d 497 (1959).

4. Unreasonable Failure to Avoid an Injury or to Mitigate Damages. Comparative fault principles apply to plaintiff's negligence that consists of unreasonable failure to avoid an injury or to mitigate damages. *McKay's Family Dodge v. Hardrives, Inc.*, 480 N.W.2d 141, 147 (Minn. Ct. App. 1992), rev. denied (Minn. March 26, 1992). The potential for the apportionment of contributory negligence that consists of an unreasonable failure to avoid an injury or to mitigate damages has been demonstrated in *Peterson v. Bendix Home Systems, Inc.*, 318 N.W.2d 50 (Minn. 1982). However, the act also limits the use of evidence of an unreasonable failure to avoid aggravating an injury or to mitigate damages by permitting its use "only in determining the damages to which the claimant is entitled." The evidence is not permitted in determining the cause of the accident. M.S.A. § 604.01, subd. 1a. *See Christopherson v. Independent School Dist. No. 284*, 354 N.W.2d 845 (Minn. Ct. App. 1984); *Foley v. West Allis*, 113 Wis.2d 475, 335 N.W.2d 824 (1983) (plaintiff's fault in causing the accident must first be compared with that of the defendant before considering the impact of the plaintiff's failure to wear seat belt; not directly applicable in Minnesota because of M.S.A. § 169.685, subd. 4). *See also Stehlik v. Rhoads*, 253 Wis.2d 477, 645 N.W.2d 889, 892–93 (2002) (modifying *Foley* in cases involving failure to wear a protective helmet by first comparing plaintiff's fault in causing the accident with that of the defendant or defendants and then requiring a second comparison of plaintiff's failure to wear a helmet with the fault of the defendant or defendants).

There are two ways to treat evidence of an unreasonable failure to mitigate damages. First, the claimant's failure to mitigate may be considered by the jury in determining the amount of damages to which the plaintiff is entitled. *See* CIVJIG 91.45. Second, the failure to mitigate may be considered as an aspect of the claimant's contributory negligence, subject to the comparative fault comparison under M.S.A. § 604.01, subd. 1. However, under no circumstances should it be considered under both.

5. Complicity. Complicity, with the 1990 amendment of the Comparative Fault Act, is now included in the definition of "fault" in M.S.A. § 604.01, subd. 1a. It is an aspect of contributory negligence, as is the case with other kinds of contributory negligence included in the definition.

JOINT AND SEVERAL LIABILITY

In 2003, the legislature amended M.S.A. § 604.02, subd. 1, to read as follows:

> Subdivision 1. [JOINT LIABILITY.] When two or more persons are severally liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that the following persons are jointly and severally liable for the whole award:
>
> (1) a person whose fault is greater than 50%;
>
> (2) two or more persons who act in a common scheme or plan that results in injury;
>
> (3) a person who commits an intentional tort; or
>
> (4) a person whose liability arises under chapters 18B—pesticide control, 115—water pollution control, 115A—waste management, 115B—environmental response and liability, 115C—leaking underground storage tanks, and 299J—pipeline safety, public nuisance law for damage to the environment or the public health, any other environmental or public health law, or any environmental or public health ordinance or program of a municipality as defined in section 466.01.

The amendment applies to claims arising from events that occur on or after August 1, 2003. Act of May 19, 2003, S.F. 872, ch. 71, Minn. Sess. Law Serv. (West 2003).

In order for the new statute to apply, the same prerequisites would have to be met that are preconditions for the application of joint and several liability under the old statute. That means that there will have to be two or more defendants who are jointly, concurrently, or successively liable to the plaintiff and who have caused a single, indivisible injury. *See Tolbert v. Gerber Industries, Inc.*, 255 N.W.2d 362, 366 n. 1 (Minn. 1977) (the term "joint tortfeasors includes those whose tortious actions are concerted, joint, or successive . . ."); *Mathews v. Mills*, 288 Minn. 16, 21, 178 N.W.2d 841, 844 (1970) (joint and several liability applied to successive acts of negligence resulting in indivisible injuries). Fault would be apportioned among the defendants in those situations, and the Comparative Fault Act will then dictate under what circumstances liability is joint and several or several only.

Under the new statute, liability is several unless one of four sets of circumstances occur, in which case joint and several liability will apply. The first is where a defendant's fault is greater than 50%. The second is where "two or more persons . . . act in a common scheme or plan that results in injury." The third is where the defendant has committed an intentional tort. The fourth is in certain environmental tort liability cases. The fourth category is retained from the earlier statute.

The second and third categories of joint and several liability pose potential problems for submitting cases to juries. The second category may require definition of the term "common scheme or plan," where fact issues exist as to whether the conduct of two or more defendants meets the definition. There is no clear definition of that term in the Minnesota case law, although it appears to correspond to the concept of "concerted action."

The third exception justifying the imposition of joint and several liability applies when a defendant has committed an intentional tort. That defendant remains jointly and severally liable for the entire award. The issue concerns the liability of any remaining defendants who may have been found liable on the basis of negligence. Prior to the amendment, the liability of two tortfeasors would have been separately submitted to a jury, and there would have been no apportionment of fault among those defendants. Minnesota has taken the position that comparative fault principles do not apply in cases involving intentional torts. *E.g., Farmer's State Bank of Darwin v. Swisher*, 631 N.W.2d 796, 801 (Minn. 2001) (comparative fault principles inapplicable in intentional tort claim); *Florenzano v. Olson*, 387 N.W.2d 168, 175 (Minn. 1986) ("without question, principles of comparative negligence would not apply to an intentional tort . . .").

Products liability cases will continue to be governed by M.S.A. § 604.02, subd. 3. In those cases, if the share of a "person in the chain of manufacture and distribution" is uncollectible, that share must be reallocated to the other parties in the chain of manufacture and distribution, "but not among the claimant or others at fault who are not in the chain of manufacture and distribution."

It is unclear whether the legislature intended that fault be apportioned between a defendant who acted negligently and a defendant who committed an intentional tort. As an example, North Dakota mandates such an apportionment, but the definition of "fault" in the North Dakota Comparative Fault Act includes willful conduct, which justifies apportionment of fault in cases involving intentional and negligent tortfeasors. N.D. Cent. Code § 32-03.2-02. However, the Minnesota Legislature did not amend the definition of "fault" in M.S.A. § 604.01, subd. 1a, to include intentional torts in the definition. Subdivision 1a's definition of "fault" includes negligence, reckless conduct, strict liability, and breach of warranty, but it does not include intentional torts in the definition. In order for fault to be apportioned among an intentional tortfeasor and a negligent tortfeasor in Minnesota, a legislative intent to mandate apportionment would have to be read into the statute by virtue of the inclusion intentional wrongdoers in the joint and several liability exceptions to the presumptive rule of several liability in the new amendment. If the determination is made that apportionable fault includes intentional torts, the definition of "fault" in CIVJIG 28.15 will have to be revised to include intentional torts. In addition, the special verdict question concerning fault apportionment will have to be written to include a line for the jury to apportion fault to the intentional tortfeasor.

The application of the amendment assumes that fault can be apportioned in the first place. In cases where fault is not subject to apportionment, as in cases involving vicarious liability, fault would not be separately apportioned among an employee and employer. In Minnesota, the liability of a master and servant is considered to be joint and several liability. *Schneider v. Buckman*, 433 N.W.2d 98, 101 (Minn. 1988), and the master is responsible for the intentional torts of the servant, if committed in the course and scope of the servant's employment. *E.g., Marston v. Minneapolis Clinic of Psychiatry & Neurology, Ltd.*, 329 N.W.2d 306, 310 (Minn. 1982). Where vicarious liability applies, the actively at-fault party and the vicariously liable party should be treated as a single entity for purposes of the allocation of fault. Restatement (Third) of Torts: Apportionment of Liability § 13 cmt. d (2000) ("When one or more parties is held liable solely because of the tortious acts of another actor, the factfinder should treat the actor and all such vicariously liable parties as a single entity for the purpose of assigning comparative responsibility.").

The comparative fault act requires the apportionment of fault of non-parties to a lawsuit as well as parties. *Hosley v. Armstrong Cork Co.*, 383 N.W.2d 289, 293 (Minn.1986); *Lines v. Ryan*, 272 N.W.2d 896, 902–03 (Minn.1978). Submission of the fault of non-parties will have an impact on the allocation of fault by the jury. In *Staab v. Diocese of St. Cloud*, 813 N.W.2d 68 (Minn. 2012), the Minnesota Supreme Court concluded that the fault of a person who was not a party to the lawsuit had to be taken into consideration in determining the extent of the liability of the sole defendant in the lawsuit. The plaintiff was injured at a parish school owned and operated by the Diocese of St. Cloud when her husband pushed her wheelchair over a five-inch drop causing her to fall forward and out of the chair. The plaintiff brought suit against the Diocese of St. Cloud. At trial, the fault of the Diocese and the plaintiff's husband was submitted to the jury, which assigned 50% of the fault to the Diocese and 50% to the husband, even though he was not a party to the litigation.

The case provided the supreme court with its first opportunity to consider the impact of the legislature's 2003 amendment of M.S.A. § 604.02, subd. 1 of the Comparative Fault Act, which provides that "[w]hen two or more persons are severally liable, contributions to awards shall be in proportion to the percentage of fault attributable to each," subject to the stated exceptions where joint and several liability is retained.

The issue as framed by the supreme court was "whether the sole defendant, the Diocese of St. Cloud, although found by the jury to be only 50% at fault, must pay 100% of the . . . jury award because Staab elected not to join her husband as a defendant." *Staab v. Diocese of St. Cloud*, 813 N.W.2d 68, 72 (Minn. 2012). In a lengthy analysis of the legislative intent underlying subdivision 1 that ultimately turned on the policy of considering the fault of a person not joined in the litigation, the court held that the word "persons" in subdivision 1 of section 604.02 means parties to the transaction, not parties to the lawsuit. The court stated that its construction of the term "persons" was consistent with its prior construction of the term "parties" as interpreted by the supreme court when construing the loss reallocation provision in subdivision 2 of section 604.02 in *Hosley v. Armstrong Cork Co.*, 383 N.W.2d 289, 293 (Minn. 1986), to mean "parties to the transaction," rather than parties to the lawsuit.

The court's mandate is clear. The fault of all "parties to the transaction," whether or not they are joined in the litigation, must be considered for purposes of determining the application of the joint and several liability rules in § 604.02, subdivision 1. For a discussion of the proof necessary to justify submission of the fault of a non-party *see* CIVSVF 28.91.

CIVJIG 28.15

COMPARATIVE FAULT

Definition of "fault"

Fault consists of:

[1. Negligence]

[2. Breach of warranty]

[3. Sale of a product in a defective condition unreasonably dangerous to the user, consumer, or (his) (her) property]

[4. Actively participating in the intoxication of another person]

[5. Illegal sale of alcoholic beverages]

[6. (A person 21 years of age or older selling, bartering, furnishing, giving to, or purchasing an alcoholic beverage for a person under 21 that causes the intoxication of that person.) (A person 21 years of age or older who controls premises, is in a reasonable position to prevent consumption of alcoholic beverages by a person under 21, and knowingly or recklessly permits that consumption and the consumption causes the intoxication of the person under 21.)]

[7. Liability for injury caused by an animal with a vicious or danger propensity known by the owner of the animal]

[8. Liability for injury or attack by a dog]

[Percentage of fault

If you find that (plaintiff's) (negligence) (fault) is greater than 50%, then (plaintiff) will receive no damages.

If you find that (plaintiff's) (negligence) (fault) is 50% or less, then (plaintiff's) damages will be reduced by that percent.

If you assigned a percentage of (negligence) (fault) to (plaintiff), I will do the reduction of damages. You are not to reduce any damage amounts yourselves for this reason.

This instruction is not meant to suggest that you should find anyone (negligent) (at fault). It is to tell you about the relationship between the percentage of (negligence) (fault) and the damages received.]

[Percentage of fault

If you find that (plaintiff) has a percent of (negligence) (fault) that is greater than any individual defendant, then (plaintiff) will not receive any damages from that defendant.

This instruction is not meant to suggest that you should find anyone (negligent) (at fault). It is to tell you about the relationship between the percentage of (negligence) (fault) and the damages received.]

USE NOTE

The first section of this instruction defines the term "fault" for use in cases where the plaintiff's theory of recovery is other than negligence.

The second and third sections are intended for use in cases where the jury is to be instructed as to the effect of their answers to the comparative fault or negligence questions on the special verdict form. The second section is intended for use in cases where there is a single plaintiff and a single defendant. The instruction tells the jury of the impact of its answers to the comparative fault or negligence questions.

The third section is intended for use in a case involving a single plaintiff and two or more defendants. The instruction tells the jury that the plaintiff is not entitled to recover damages from any defendant whose fault is less than the fault of the plaintiff. In cases involving a plaintiff and multiple defendants, the plaintiff's fault is compared to the fault of each individual defendant. The only clearly established exceptions exist in cases involving vicarious liability, and where the defendants are involved in a joint venture. In those cases, the second section can be modified to state that the plaintiff will not be entitled to recover if the plaintiff's fault is greater than the combined fault of the defendants.

The language in the third section goes no further that to instruct the jury of the impact of its answers in cases involving multiple defendants, primarily because of the complexity of instructing the jury on the impact of the loss reallocation provisions in the Comparative Fault Act.

AUTHORITIES

Instructing the Jury as to the Effect of Its Answers

M.S.A. § 604.01, subd. 1 (1998), reads as follows:

> Contributory fault does not bar recovery in an action by any person or the person's legal representative to recover damages for fault resulting in death, in injury to person or property, or in economic loss, if the contributory fault was not greater than the fault of the person against whom recovery is sought, but any damages allowed must be diminished in proportion to the amount of fault attributable to the person recovering. The court may, and when requested by any party shall, direct the jury to find separate special verdicts determining the amount of damages and the percentage of fault attributable to each party and the court shall then reduce the amount of damages in proportion to the amount of fault attributable to the person recovering.

Rule 49.01(b) of the Minnesota Rules of Civil Procedure reads as follows:

> **(b)** In actions involving Minn.Stat. c. 604 the court shall inform the jury of the effect of its answers to the comparative fault question and shall permit counsel to comment thereon, unless the court is of the opinion that doubtful or unresolved questions of law or complex issues of law or fact are involved which may render such instruction or comment erroneous, misleading, or confusing to the jury.

In *Steiner v. Beaudry Oil & Service, Inc.*, 545 N.W.2d 39 (Minn. Ct. App. 1996), rev. denied (Minn. May 21, 1996), the trial court's instruction to the jury, which was based in part on JIG 202 (Supp. 1997), was as follows:

> The law requires that fault be apportioned among those parties found to be at fault in causing the plaintiff's property damage. If by your answers to Questions Two and Four you have determined that both parties are at fault and that their fault was a direct cause of plaintiff's property damage, you must apportion fault among them by answering Question Number Five. Plaintiffs may not recover from a defendant when their negligence is greater than the negligence of the defendant. Also any damages awarded by you will be reduced by the plaintiff's applicable percentage of fault.

In discussing the application of Rule 49.01(b), the court of appeals set out the following framework:

> Rule 49.01(b) contemplates the use of examples and hypotheticals explaining how a plaintiff's damages might be reduced by the apportionment of fault. * * * Indeed, it is insufficient for a trial court merely to instruct a jury that a plaintiff will recover if his fault is not greater than the fault of the person against whom he seeks to recover: the court must allow comment on the effect of the jury's answers to the percentage of negligence questions. * * *
>
> While Rule 49.01(b) requires that the jury be informed of the effect of its apportionment of negligence, the jury still must be cautioned to determine damages without regard to any of its other special verdict answers. * * *

Minnesota follows Wisconsin's rule in requiring individual comparisons of fault. *Marier v. Memorial Rescue Service, Inc.*, 296 Minn. 242, 246, 207 N.W.2d 706, 709 (1973); *see Reiter v. Dyken*, 95 Wis.2d 461, 290 N.W.2d 510, 514 (1980), noted in *Cambern v. Sioux Tools, Inc.*, 323 N.W.2d 795, 797 (Minn. 1982). The only clearly established exceptions exist in cases involving vicarious liability, *Larsen v. Minneapolis Gas Co.*, 282 Minn. 135, 150, 163 N.W.2d 755, 765 (1968), and where the defendants are involved in a joint venture. *See Cambern,* 323 N.W.2d at 797; *Krengel v. Midwest Automatic Photo, Inc.*, 295 Minn. 200, 209, 203 N.W.2d 841, 847 (1973).

Comparative Fault

This instruction is consistent with the definition of "fault" in the Comparative Fault Act, M.S.A. § 604.01, subd. 1a. The definition of "fault" in the Comparative Fault Act reads as follows:

> "Fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an express consent, misuse of a product and unreasonable failure to avoid an injury or to mitigate damages, and the defense of complicity under section 340A.801. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.
>
> Evidence of unreasonable failure to avoid aggravating an injury or to mitigate damages may be considered only in determining the damages to which the claimant is entitled. It may not be considered in determining the cause of an accident.

M.S.A. § 604.01, subd. 1a.

It is clear from the definition that separate defenses are enumerated, including negligence on the part of the claimant, assumption of risk, product misuse, and unreasonable failure to avoid an injury or to mitigate damages. In the jury instruction, these separate defenses, except for complicity, are merged into a single defense of contributory fault, defined as failure by the plaintiff to exercise reasonable care for his or her own safety. The Committee is of the opinion that this treatment, rather than a separate enumeration and submission of each defense, is consistent with pre-Comparative Fault Act treatment of defenses to strict liability claims. In *Busch v. Busch Construction, Inc.*, 262 N.W.2d 377, 394 (Minn. 1977), the defenses of contributory negligence, misuse, and assumption of the risk were separately enumerated, but the supreme court subsequently indicated in *Armstrong v. Mailand*, 284 N.W.2d 343, 351 (Minn. 1979) that contributory negligence and secondary assumption of the risk would be merged into a single defense of contributory negligence. This was the position taken by the court in *Springrose v. Willmore*, 292 Minn. 23, 192 N.W.2d 826 (1971), decided under the comparative negligence statute.

While the supreme court has not taken a specific position on the application of the defense of "misuse," in cases involving negligence claims, product misuse has been treated as a facet of contributory negligence. *See Johnson v. West Fargo Mfg. Co.*, 255 Minn. 19, 95 N.W.2d 497 (1959).

Complicity is now a defense that is subject to apportionment in Civil Damage Act cases. *See* CIVJIG 45.35 and Authorities. That defense is subject to additional requirements. *See K.R. v. Sanford*, 605 N.W.2d 387, 391–94 (Minn. 2000).

The potential for the apportionment of contributory negligence that consists of an unreasonable failure to avoid an injury or to mitigate damages has been demonstrated in *Peterson v. Bendix Home Systems, Inc.*, 318 N.W.2d 50 (Minn. 1982). However, inclusion of failure to mitigate damages in the comparative fault question may result in problems, particularly in cases where the plaintiff was not at fault in causing the accident, although he may have been at fault in failing to take precautions to avoid further injuries. In such cases, it may be desirable to submit the issue of mitigation of damages separately under CIVJIG 91. 45. *See Christopherson v. Independent School Dist. No. 284*, 354 N.W.2d 845, 848 (Minn. Ct. App. 1984); *Foley v. West Allis*, 113 Wis.2d 475, 335 N.W.2d 824 (1983) (plaintiff's fault in causing the accident must first be compared with that of the defendant before considering the impact of the plaintiff's failure to wear seat belt; not directly applicable in Minnesota because of M.S.A. § 169.685, subd. 4). *See also Stehlik v. Rhoads*, 253 Wis.2d 477, 645 N.W.2d 889, 892–93 (2002) (modifying *Foley* in cases involving failure to wear a protective helmet by first comparing plaintiff's fault in causing the accident with that of the defendant or defendants and then requiring a second comparison of plaintiff's failure to wear a helmet with the fault of the defendant or defendants).

The definition of "fault" in the Comparative Fault Act will not sweep aside all exceptions to defenses that existed prior to the enactment of the Act. For example, in cases involving legislation intended to protect a specific class of persons, or legislation that has limited the available defenses in an action based upon that legislation, contributory negligence may not be available as a defense, the Comparative Fault Act notwithstanding. *See Seim v. Garavalia*, 306 N.W.2d 806 (Minn. 1981); *Zerby v. Warren*, 297 Minn. 134, 210 N.W.2d 58 (1973).

As in other cases where only a negligence claim is involved, where the contributory negligence of a child is involved, it is improper to give a separate instruction concerning contributory negligence. The instructions concerning the negligence of a child are sufficient. *See* CIVJIG 70.15 and 70.20.

The negligence of a parent is not imputed to the parent's child and will not bar a child from recovering for injuries sustained through the negligence of a third party. *See Peterson v. Richfield Plaza, Inc.*, 252 Minn. 215, 89 N.W.2d 712 (1958); *Ewing v. George Benz & Sons*, 224 Minn. 508, 28 N.W.2d 733 (1947); *Forseth v. Duluth-Superior Transit Co.*, 202 Minn. 447, 278 N.W. 904 (1938). However, the parent's negligence will bar the parent's separate claim for damages arising out of injury to the child. *See Hondl v. Chicago Great Western Ry. Co.*, 249 Minn. 306, 82 N.W.2d 245 (1957); *Mattson v. Minnesota & N.W. Ry. Co.*, 98 Minn. 296, 108 N.W. 517 (1906). The child's negligence will bar the claim of the child and the separate claim of the parent.

Where the negligence of parent and child are involved, there should not be separate instructions on contributory negligence, where the only claims involved are negligence claims.

Research References

West's Key Number Digest
Negligence ⚷423, 453, 503; Products Liability ⚷27, 28, 96

Legal Encyclopedias
C.J.S., Motor Vehicles §§ 429 to 430; Negligence §§ 198, 200, 228 to 230, 247 to 248, 262 to 264, 298, 302, 654; Products Liability §§ 74 to 80, 206 to 217

CIVJIG 28.25

SECONDARY ASSUMPTION OF RISK

[The Committee recommends no instruction.]

USE NOTE

In *Springrose v. Willmore*, 292 Minn. 23, 192 N.W.2d 826 (1971), the Minnesota Supreme Court merged the defenses of contributory negligence and secondary assumption of the risk. The court stated that "[t]he only question for submission in the usual case, we think, will be whether the particular plaintiff was, under the circumstances, negligent in regard to his own safety, for under that general issue counsel may fully argue that issue in all its respects." *Id.* at 26, 192 N.W.2d at 828. Because of the merger of secondary assumption of risk and contributory negligence, it will ordinarily be inappropriate to separately instruct the jury on assumption of risk. *See Thompson v. Hill*, 366 N.W.2d 628 (Minn. Ct. App. 1985); *Isker v. Gardner*, 360 N.W.2d 468 (Minn. Ct. App. 1985). While the definition of "fault" in section 604.01, subdivision 1a, includes secondary assumption of risk, it does not mandate separate submission of the defenses listed in that subdivision.

AUTHORITIES

To establish assumption of risk, the defendant must show that the plaintiff had knowledge of the risk, *see Guile v. Greenberg*, 192 Minn. 548, 257 N.W. 649 (1934); appreciated it, *see Mayzlik v. Lansing Elevator Co.*, 241 Minn. 468, 63 N.W.2d 380 (1954); *Lincoln v. Cambridge-Radisson Co.*, 235 Minn. 20, 49 N.W.2d 1 (1951), and, having an opportunity either to incur it or avoid it, voluntarily chose to incur it. *See Schroeder v. Jesco, Inc.*, 296 Minn. 447, 209 N.W.2d 414 (1973); *Zuber v. Northern Pac. Ry. Co.*, 246 Minn. 157, 74 N.W.2d 641 (1956); *Guile v. Greenberg*, 192 Minn. 548, 257 N.W. 649 (1934). In addition, the plaintiff must have been negligent in encountering the risk. *See Springrose v. Willmore*, 292 Minn. 23, 192 N.W.2d 826 (1971). Volition to incur the risk requires that a free choice be available. If there is no available choice whereby the risk may be avoided, assumption of risk is not the proper defense. *See Donald v. Moses*, 254 Minn. 186, 94 N.W.2d 255 (1959).

Secondary assumption of risk must be distinguished from primary assumption of risk. If there is primary assumption of risk, the defendant is not liable to the plaintiff, and the defense issue will not arise. *See Griffiths v. Lovelette Transfer Co.*, 313 N.W.2d 602, 605 (Minn. 1981); *Armstrong v. Mailand*, 284 N.W.2d 343, 348 (Minn. 1979); *Beckman v. V.J.M. Enterprises, Inc.*, 269 N.W.2d 37, 39 (Minn. 1978).

Because of the merger of secondary assumption of risk and contributory negligence in *Springrose v. Willmore*, 292 Minn. 23, 192 N.W.2d 826 (1971), it will ordinarily be inappropriate to give a separate instruction on secondary assumption of risk. *See Thompson v. Hill*, 366 N.W.2d 628, 632 (Minn. Ct. App. 1985); *Isker v. Gardner*, 360 N.W.2d 468, 470 (Minn. Ct. App. 1985). *But see Kantorowicz v. VFW Post, #230*, 349 N.W.2d 597, 599–600 (Minn. Ct. App. 1984) (stating that it is discretionary whether a trial judge gives an assumption of risk instruction, *citing Adee v. Evanson*, 281 N.W.2d 177, 180 (Minn. 1979)).

The merger of defenses should continue under the Comparative Fault Act. Subdivision 1a of section 604.01 reads as follows:

> "Fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an express consent, misuse of a product and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis of liability and contributory fault.

The definition includes secondary assumption of risk. However, the definition defines the types of conduct subject to comparison. It does not mandate separate submission of the defenses listed in the section. *See* Introductory Note, Defenses.

Research References

West's Key Number Digest
Negligence ⚷550, 1747

Legal Encyclopedias
C.J.S., Negligence §§ 360 to 380, 529 to 531, 654, 871, 883, 892 to 897

CIVJIG 28.30

PRIMARY ASSUMPTION OF RISK

[The Committee recommends no instruction.]

USE NOTE

Primary assumption of risk is not an affirmative defense that is subject to comparison under the Minnesota Comparative Fault Act, M.S.A. § 604.01, subd. 1a (" 'Fault' includes . . . unreasonable assumption of risk not constituting an express consent or primary assumption of risk."). Rather, it relates to the issue of whether the defendant owes a duty to the plaintiff. If there are fact questions concerning the application of primary assumption of risk, such as whether the plaintiff knew of and appreciated the risk of injury and voluntarily encountered the risk, those fact questions may be the subject of appropriate special verdict questions. If the issue is whether the plaintiff assumed an inherent risk in a particular sporting activity, that issue could be submitted to the jury pursuant to an appropriate special verdict question. A suggested jury instruction covering primary assumption of risk in sporting events is set out in the Authorities.

AUTHORITIES

In *Springrose v. Willmore*, 292 Minn. 23, 24–25, 192 N.W.2d 826, 827 (1971), the court was required to consider the differences between secondary and primary assumption of risk because of the adoption of the comparative negligence statute:

> Assumption of risk has been conceptually distinguished according to its primary or secondary character. Primary assumption of risk, express or implied, relates to the initial issue of whether a defendant was negligent at all-that is, whether the defendant had any duty to protect the plaintiff from a risk of harm. It is not, therefore, an affirmative defense. The limited duties owed licensees upon another's property, *e.g., Sandstrom v. AAD Temple Bldg. Assn., Inc.*, 267 Minn. 407, 127 N.W.2d 173 (1964), or patrons of inherently dangerous sporting events, *e.g., Aldes v. St. Paul Ball Club*, 251 Minn. 440, 88 N.W.2d 94 (1958), are illustrative. The classes of cases involving an implied primary assumption of risk are not many and, because this is not such a case, we have no occasion to determine the method by which such issue should be presented to a jury.
>
> Secondary assumption of risk, as an affirmative defense to be proved by a causally negligent defendant, is the principal issue for our determination now. The doctrine of implied assumption of risk must, in our view, be recast as an aspect of contributory negligence, mean-

> ing that the plaintiff's assumption of risk must be not only voluntary but, under all the circumstances, unreasonable. Instruction 135, Minnesota Jury Instruction Guides, remains an appropriate definition of assumption of risk, but Instruction 136 is to be abandoned. The practical and most important impact of this decision is to mandate that, like any other form of contributory negligence, assumption of risk must be apportioned under our comparative negligence statute, Minn. St. 604.01, subd. 1.

Subsequent cases have followed the *Springrose* nomenclature. If the plaintiff has assumed the risk in the primary sense, the defendant owes no duty to the plaintiff. *See Rieger v. Zackoski*, 321 N.W.2d 16, 23 (Minn. 1982); *Griffiths v. Lovelette Transfer Co., Inc.*, 313 N.W.2d 602, 605 (Minn. 1981); *Armstrong v. Mailand*, 284 N.W.2d 343, 348 (Minn. 1979); *Olson v. Hansen*, 299 Minn. 39, 44, 216 N.W.2d 124, 127 (1974); *Swagger v. Crystal*, 379 N.W.2d 183, 185 (Minn. Ct. App. 1985).

More recently, Minnesota appellate courts have indicated that primary assumption of risk should apply only to a limited set of cases, primarily those involving inherently dangerous sporting events. In *Daly v. McFarland*, 812 N.W.2d 113 (Minn.2012), the court rejected the defendant's argument that primary assumption of risk should apply in a case involving injuries sustained by an experienced snowmobile operator in an accident with another operator. The court noted that "[t]he doctrine commonly applies to participants and spectators of inherently dangerous sports," but that it has been applied in products liability cases. *Id.* at 120 and 120 n. 1. The court of appeals rejected a defense argument that primary assumption of risk applied to a premises liability accident in *Renswick v. Wenzel*, 819 N.W.2d 198, 205 (Minn. Ct. App.2012), noting that "[a] finding of primary assumption of risk is a rare thing in Minnesota." In *Eischen v. Crystal Valley Co-op.*, 835 N.W.2d 629, 635 (Minn. Ct. App. 2013), a farm accident arising out of the use of a crop sprayer, the court of appeals noted that " '[o]ne of the few instances where primary assumption of risk applies is in cases involving patrons of inherently dangerous sporting events,' " (*quoting Wagner v. Thomas J. Obert Enters.*, 396 N.W.2d 223, 226 (Minn.1986)). The court in *Eischen* nonetheless proceeded to consider its potential application, but held that the issue could not be decided as a matter of law. In *Schneider ex rel. Schneider v. Erickson*, 654 N.W.2d 144, 149 (Minn. Ct. App. 2002), the court of appeals noted that "Minnesota courts rarely apply primary assumption of the risk, and have found that its application is only appropriate under limited circumstances."

Pre-comparative fault cases often state that the assumption of risk issue is usually for the jury, unless the evidence is conclusive on the issue. *See, e.g.*, *Hollinbeck v. Downey*, 261 Minn. 481, 486, 113 N.W.2d 9, 13 (1962). The courts take the same position in post-comparative fault cases. *See, e.g*, *Snilsberg v. Lake Washington Club*, 614 N.W.2d 738, 744 (Minn. Ct. App. 2000); *Jussila v. U.S. Snowmobile Ass'n*, 556 N.W.2d 234, 236 (Minn. Ct. App. 1996). How the issue should be submitted is yet another question.

If primary assumption of the risk is submitted to the jury in the narrow range of cases involving inherently dangerous sporting events, a suggested instruction is as follows:

> A person who is involved in (name of activity) assumes the risks inherent in that activity. You must decide whether (plaintiff's) (injury) (accident) arose out one of those inherent risks.

The instruction tracks the supreme court's opinion in *Wagner v. Thomas J. Obert Enterprises*, 396 N.W.2d 223, 226 (Minn. 1986).

If the instruction is given, the correlative special verdict question should ask, "Did plaintiff assume an inherent risk of (name of activity) in (her) (his) accident of ________?" The jury should then be instructed to answer the breach of duty question only if it answered "no" to this question.

If the primary assumption of risk issue is submitted to the jury in other cases, there are two potential alternatives. One is to tailor special verdict questions to disputed questions of fact that are relevant to the primary assumption of risk or duty issues. *E.g., Griffiths v. Lovelette Transfer Co.*, 313 N.W.2d 602, 605 (Minn. 1981). A second, where there is an issue concerning whether the plaintiff assumed a risk inherent in a particular activity, is to submit that issue to the jury. *E.g., Wagner v. Thomas J. Obert Enterprises*, 396 N.W.2d 223, 227 (Minn. 1986) (roller skating accident in which court suggests asking the jury whether plaintiff assumed "an inherent risk of roller-skating in her accident . . ."). *But see Louis v. Louis*, 636 N.W.2d 314, 321–22 n. 8 (Minn. 2001) (Minnesota Supreme Court indicated that the primary assumption of risk issue would be resolved by the jury, after the trial court determined that the defendant owed a duty to the plaintiff, where there were genuine issues of material fact concerning the issue.). For a statement of the elements that could be included in a primary assumption of risk instruction, *see Snilsberg v. Lake Washington Club*, 614 N.W.2d 738, 747 (Minn. Ct. App. 2000).

Research References

West's Key Number Digest
Negligence ⚷550, 1747

Legal Encyclopedias
C.J.S., Negligence §§ 360 to 380, 529 to 531, 654, 871, 883, 892 to 897

SPECIAL VERDICT FORMS

CIVSVF 28.90

NEGLIGENCE; COMPARATIVE NEGLIGENCE; ONE PLAINTIFF, ONE DEFENDANT

1. Was (defendant) negligent? ____________ Yes or No

2. *If your answer to Question 1 was "Yes," then answer this question*: Was this negligence by (defendant) a direct cause of the (collision) (accident) (event)? ____________ Yes or No

3. Was (plaintiff) negligent? ____________ Yes or No

4. *If your answer to Question 3 was "Yes," then answer this question*: Was this negligence by (plaintiff) a direct cause of the (collision) (accident) (event)? ____________ Yes or No

If you answered "Yes" to Questions 2 and 4, then answer Question 5.

5. Taking all of the negligence that contributed as a direct cause of the (collision) (accident) (event) as 100%, what percentage of negligence do you attribute to:

(defendant) ________%

(plaintiff) ________%

TOTAL 100%

USE NOTE

This special verdict form assumes a single plaintiff and a single defendant. It may be applied in a variety of cases involving negligence claims.

The special verdict questions and their supporting jury instructions are as follows:

1. CIVJIG 25.10: Negligence
2. CIVJIG 27.10: Direct Cause
3. CIVJIG 25.10: Negligence
4. CIVJIG 27.10: Direct Cause
5. CIVJIG 28.15: Comparative Fault

AUTHORITIES

M.S.A. § 604.01, subd. 1, provides as follows:

> Contributory fault does not bar recovery in an action by any person or the person's legal representative to recover damages for fault resulting in death, in injury to person or property, or in economic loss, if the contributory fault was not greater than the fault of the person against whom recovery is sought, but any damages allowed must be diminished in proportion to the amount of fault attributable to the person recovering. The court may, and when requested by any party shall, direct the jury to find separate special verdicts determining the amount of damages and the percentage of fault attributable to each party and the court shall then reduce the amount of damages in proportion to the amount of fault attributable to the person recovering.

The special verdict form should instruct the jury to answer the apportionment question only if it answered "yes" to the causation questions. *Daly v. McFarland*, 812 N.W.2d 113, 126–27 (Minn. 2012).

CIVSVF 28.91

NEGLIGENCE; COMPARATIVE FAULT; ONE PLAINTIFF, MULTIPLE DEFENDANTS; NONLITIGANTS

1. Was (defendant one) negligent?

____
Yes or No

2. *If your answer to Question 1 was "Yes," then answer this question*: Was this negligence by (defendant one) a direct cause of the (collision) (accident) (event)?

____
Yes or No

3. Was (defendant two) (settling defendant) (nonlitigant) negligent?

____
Yes or No

4. *If your answer to Question 3 was "Yes," then answer this question*: Was this negligence by (defendant two) (settling defendant) (nonlitigant) a direct cause of the (collision) (accident) (event)?

____
Yes or No

5. Was (plaintiff) negligent?

____
Yes or No

6. *If your answer to Question 5 was "Yes," then answer this question*: Was this negligence by (plaintiff) a direct cause of the (collision) (accident) (event)?

____
Yes or No

If you answered "Yes" to two or more of Questions 2, 4, and 6, then answer Question 7.

7. Taking all of the negligence that contributed as a direct cause of the (collision) (accident) (event) as 100%, what percentage of negligence do you attribute to:

(defendant one)
If you answered "Yes" to Question 2 _______%

(defendant two) (Settling defendant)
(Nonlitigant)
If you answered "Yes" to Question 4 _______%

(plaintiff)
If you answered "Yes" to Question 6 _______%

TOTAL 100%

USE NOTE

This special verdict form assumes one plaintiff and multiple defendants or one defendant and a settling defendant or nonlitigant. Under the Comparative Fault Act the jury must apportion the negligence of a settling defendant and/or the negligence of an identified person or entity, even though never joined in the litigation. The form can readily be expanded to include additional defendants or non-parties.

The special verdict questions and their supporting jury instructions are as follows:

1. CIVJIG 25.10: Negligence
2. CIVJIG 27.10: Direct Cause
3. CIVJIG 25.10: Negligence
4. CIVJIG 27.10: Direct Cause
5. CIVJIG 25.10: Negligence
6. CIVJIG 27.10: Direct Cause
7. CIVJIG 28.15: Comparative Fault

AUTHORITIES

The Minnesota Comparative Fault Act requires the fault of all "parties to the transaction," rather than just the parties to the litigation, to be submitted to the jury, even if they are not joined in the litigation. *Lines v. Ryan*, 272 N.W.2d 896, 903 (Minn. 1978); *Hosley v. Armstrong Cork Co.*, 383 N.W.2d 289, 293 (Minn. 1986); *Radel v. Bloom Lake Farms*, 553 N.W.2d 109, 112 (Minn. Ct. App. 1996). Parties who settle pursuant to a *Pierringer* release must be included on the special verdict form.

Frey v. Snelgrove, 269 N.W.2d 918, 923 (Minn. 1978). In *Ripka v. Mehus*, 390 N.W.2d 878, 882 (Minn. Ct. App. 1986), the court of appeals noted that the Minnesota Supreme Court has not decided the issue of "whether, under any circumstances, the alleged negligence of an unknown, phantom tortfeasor must be submitted to the jury for apportionment under the Comparative Fault Act and if so, what form or quantum of evidence of the phantom tortfeasor's existence is necessary to create a jury issue." *Id.* The court said that it was unnecessary to decide that ultimate issue. The court simply held "that a mere allegation by the defendant that the phantom tortfeasor existed is insufficient to justify submission to the jury."

In *Staab v. Diocese of St. Cloud*, 813 N.W.2d 68 (Minn. 2012), the Minnesota Supreme Court concluded that the fault of a person who was not a party to the lawsuit had to be taken into consideration in determining the extent of the liability of the sole defendant in the lawsuit. The plaintiff was injured at a parish school owned and operated by the Diocese of St. Cloud when her husband pushed her wheelchair over a five-inch drop causing her to fall forward and out of the chair. The plaintiff brought suit against the Diocese of St. Cloud. At trial, the fault of the Diocese and the plaintiff's husband was submitted to the jury, which assigned 50% of the fault to the Diocese and 50% to the husband, even though he was not a party to the litigation.

The case provided the supreme court with its first opportunity to consider the impact of the legislature's 2003 amendment of M.S.A. § 604.02, subd. 1 of the Comparative Fault Act, which provides that "[w]hen two or more persons are severally liable, contributions to awards shall be in proportion to the percentage of fault attributable to each," subject to the stated exceptions where joint and several liability is retained.

The issue as framed by the supreme court was "whether the sole defendant, the Diocese of St. Cloud, although found by the jury to be only 50% at fault, must pay 100% of the . . . jury award because Staab elected not to join her husband as a defendant." *Staab*, 813 N.W.2d 68, 72. In a lengthy analysis of the legislative intent underlying subdivision 1 that ultimately turned on the policy of considering the fault of a person not joined in the litigation, the court held that the word "persons" in subdivision 1 of section 604.02 means parties to the transaction, not parties to the lawsuit. The court stated that its construction of the term "persons" was consistent with its prior construction of the term "parties" as interpreted by the supreme court when construing the loss reallocation provision in subdivision 2 of section 604.02 in *Hosley v. Armstrong Cork Co.*, 383 N.W.2d 289, 293 (Minn. 1986), to mean "parties to the transaction," rather than parties to the lawsuit.

The court's mandate is clear. The fault of all "parties to the transaction," whether or not they are joined in the litigation, must be considered for purposes of determining the application of the joint and several liability rules in section 604.02, subdivision 1.

CIVSVF 28.92

NEGLIGENCE; COMPARATIVE FAULT; TWO PLAINTIFFS, ONE DEFENDANT

1. Was (defendant) negligent? ____________ Yes or No

2. *If your answer to Question 1 was "Yes," then answer this question*: Was this negligence by (defendant) a direct cause of the (collision) (accident) (event)?

   ____________ Yes or No

3. Was (plaintiff one) negligent?

   ____________ Yes or No

4. *If your answer to Question 3 was "Yes," then answer this question*: Was this negligence by (plaintiff one) a direct cause of the (collision) (accident) (event)?

   ____________ Yes or No

5. Was (plaintiff two) negligent?

   ____________ Yes or No

6. *If your answer to Question 5 was "Yes," then answer this question:* Was this negligence by (plaintiff two) a direct cause of the accident?

   ____________ Yes or No

If you answered "Yes" to Question 2, and you also answered "Yes" to Question 4 and/or 6, then answer Question 7.

7. Taking all of the negligence that contributed as a direct cause of the (collision) (accident) (event) as 100%, what percentage of negligence do you attribute to:

   (defendant one)
   If you answered "Yes" to Question 2 ________%

(plaintiff one)
If you answered "Yes" to Question 4 ________%

(plaintiff two)
If you answered "Yes" to Question 6 ________%

TOTAL 100%

USE NOTE

This special verdict form is intended for use in cases involving two plaintiffs and a single defendant. It applies when all persons listed on the special verdict form may have contributed to the accident or injuries giving rise to the negligence claim. It applies, for example, in cases where parents make a claim for medical expenses for a child's injuries and one or both parents may have been at fault in causing the child's injuries. It also applies in cases where one spouse has a loss of consortium claim arising out of the injury to the other spouse, but also may have been at fault in causing the injury-producing accident.

The special verdict questions and their supporting jury instructions are as follows:

1. CIVJIG 25.10: Negligence
2. CIVJIG 27.10: Direct Cause
3. CIVJIG 25.10: Negligence
4. CIVJIG 27.10: Direct Cause
5. CIVJIG 25.10: Negligence
6. CIVJIG 27.10: Direct Cause
7. CIVJIG 28.15: Comparative Fault

AUTHORITIES

In *Wineman v. Carter*, 212 Minn. 298, 4 N.W.2d 83 (1942), the Minnesota Supreme Court held that a parent's claim for loss of a child's services and medical expenses incurred because of his or child's injuries is subject to the defense of contributory negligence of the child. If the child's claim is barred, so is the parent's. 212 Minn. at 300, 4 N.W.2d at 84. The fault of the parent is not imputed to the child, however. *Mattson v. Minnesota & N.W.R. Co.*, 95 Minn. 477, 488, 104 N.W. 443, 448 (1905).

Where parents claim medical expenses incurred because of the child's injuries, an issue may arise as to whether both parents are to be treated as a unit for purposes of fault allocation. In *Reber v. Hanson*, 260 Wis. 632, 51 N.W.2d 505, 507–08 (1952), however, the Wisconsin Supreme Court held that the duty of parents to supervise their child was indivisible where the parents had the same duty and opportunity to fulfill that duty. *Reber* appears to be the only Wisconsin case where the fault of parents was combined on the basis of the family relationship. *See Nischke v. Farmers & Merchants Bank & Trust*, 187 Wis.2d 96, 522 N.W.2d 542 (1994), rev. denied, 527 N.W.2d 335 (Wis. 1994).

The fault of the parent claiming medical expenses has to be submitted on the same special verdict form as the fault of the injured child and the defendant. It is error to submit the claims of the parent and child on separate special verdict forms. *See Ferguson v. Northern States Power Co.*, 307 Minn. 26, 25–36, 239 N.W.2d 190, 195–96 (1976).

The supreme court has also held that a spouse's claim for loss of consortium is barred by the injured spouse's contributory negligence. *Peters v. Bodin*, 242 Minn. 489, 496–97, 65 N.W.2d 917, 922 (1954). After the enactment of the Comparative Fault Act, the consortium claim is not barred but must be reduced by the percentage of fault assigned to the injured spouse. *See Victorson v. Milwaukee & Suburban Transport Co.*, 70 Wis.2d 336, 234 N.W.2d 332, 344 (1975), abrogated on other grounds, *Nommensen v. American Continental Ins. Co.*, 246 Wis.2d 132, 629 N.W.2d 301 (2001). If both the injured spouse and the spouse claiming loss of consortium are found to be at fault, the Wisconsin Supreme Court has taken the position that the consortium claim would be reduced by the percentages of fault assigned to teach. *See White v. Lunder*, 66 Wis.2d 563, 225 N.W.2d 442, 449 (1975) (jury apportioned 33% of causal negligence to husband claiming loss of consortium and medical expenses, 30% to injured wife, and 37% to the third party; court held that husband's claims is reduced by 63%, the combined negligence of the husband and wife). Minnesota has not addressed this question.

CIVSVF 28.93

NEGLIGENCE; COMPARATIVE FAULT; WRONGFUL DEATH; ONE DEFENDANT, SURVIVING SPOUSE OR NEXT OF KIN

1. Was (defendant) negligent?

   ____
   Yes or No

2. *If your answer to Question 1 was "Yes," then answer this question*: Was this negligence by (defendant) a direct cause of the (collision) (accident) (event)?

   ____
   Yes or No

3. Was (decedent) negligent?

   ____
   Yes or No

4. *If your answer to Question 3 was "Yes," then answer this question*: Was this negligence by (decedent) a direct cause of the (collision) (accident) (event)?

   ____
   Yes or No

5. Was (surviving spouse or next of kin) negligent?

   ____
   Yes or No

6. *If your answer to Question 5 was "Yes," then answer this question*: Was this negligence by (surviving spouse or next of kin) a direct cause of the (collision) (accident) (event)?

   ____
   Yes or No

If you answered "Yes" to Question 2, and you also answered "Yes" to Question 4 and/or 6, then answer Question 7.

7. Taking all of the negligence that contributed as a direct cause of the (collision) (accident) (event) as 100%, what percentage of negligence do you attribute to:

(defendant)
If you answered "Yes" to Question 2 _______%

(decedent)
If you answered "Yes" to Question 4 _______%

(surviving spouse or next of kin)
If you answered "Yes" to Question 6 _______%
TOTAL 100%

USE NOTE

This special verdict form is intended for use in wrongful death cases where the fault of the decedent and of a surviving spouse or next of kin is in issue. The fault of the decedent will reduce the wrongful death recovery, and the fault of the surviving spouse or next of kin will further reduce that person's recovery. There will be no recovery if the fault of the decedent is greater than the fault of the person from whom recovery is sought. The surviving spouse or next of kin will also be barred if their fault is greater than the fault of the person from whom recovery is sought.

The special verdict questions and their supporting jury instructions are as follows:

1. CIVJIG 25.10: Negligence
2. CIVJIG 27.10: Direct Cause
3. CIVJIG 25.10: Negligence
4. CIVJIG 27.10: Direct Cause
5. CIVJIG 25.10: Negligence
6. CIVJIG 27.10: Direct Cause
7. CIVJIG 28.15: Comparative Fault

AUTHORITIES

Damages in a wrongful death action pursuant to M.S.A. § 573.02 will be reduced by the decedent's percentage of fault. *See Olson v. Hartwig*, 288 Minn. 375, 377–79, 180 N.W.2d 870, 872–73 (1970). The fault of a surviving spouse or next of kin will also reduce that person's recovery. *See Martz v. Revier*, 284 Minn. 166, 169, 170 N.W.2d 83, 85 (1969) (pre-comparative negligence, a surviving or next of kin not entitled to recover if negligent).

DIVISION C

VICARIOUS LIABILITY AND IMPUTED FAULT

CATEGORY 30

VICARIOUS LIABILITY—BUSINESS ENTITIES

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INTRODUCTORY NOTE

In some cases the fault of one party may be imputed to another under vicarious liability principles. Principals may be vicariously liable for the acts of their agents, depending on the nature of the agency relationship. Employers may be liable for the torts of their employees. A partnership may be liable for the actions of the partners. Members of a joint enterprise or joint venture may be responsible for the actions of other members of the enterprise or venture. Establishing a relationship that results in the imposition of vicarious liability or the imputation of fault means that the active fault or liability of one party will become the responsibility of the other party or parties in the relationship, even if they were not personally liable.

Master—Servant. An employer is vicariously liable for the torts of its employees if the torts are committed in the course and scope of employment. *Schneider v. Buckman*, 433 N.W.2d 98, 101 (Minn. 1988); *Ismil v. L.H. Sowles Co.*, 295 Minn. 120, 123, 203 N.W.2d 354, 357 (1972). Minnesota characterizes the liability of master-servant as joint and several liability. *Schneider*, 433 N.W.2d at 101; *Kisch v. Skow*, 305 Minn. 328, 332, 233 N.W.2d 732, 734 (1975).

Independent Contractors. Employers of independent contractors generally are not vicariously liable for the physical acts of the independent contractors unless an exception to the general no-liability rule is established. The nature of the employment relationship will be critical in determining whether a person is an employee or independent contractor, with the control element typically the pivotal factor in making that determination. *E.g., Ossenfort v. Associated Milk Producers, Inc.*, 254 N.W.2d 672, 676 (Minn. 1977). However, an independent contractor may be an agent for purposes of binding a principal for non-physical torts.

Partnerships. Partners are agents of the partnership:

> (1) Each partner is an agent of the partnership for the purpose of its business. An act of a partner, including the execution of an instrument in the partnership name, for apparently carrying on in the ordinary course the partnership business or business of the kind carried on by the partnership binds the partnership, unless the partner had no authority to act for the partnership in the particular matter and the person with whom the partner was dealing knew or had received a notification that the partner lacked authority.
>
> (2) An act of a partner which is not apparently for carrying on in the ordinary course the partnership business or business of the kind carried on by the partnership binds the partnership only if the act was authorized by the other partners.

M.S.A. § 323A.0301. An act of a partner "apparently carrying on in the ordinary course the partnership business" usually binds the partnership. M.S.A. § 323A.0301. "Thus, if a partner commits a wrongful act or omission while acting 'in the ordinary course of the business of the partnership' the partnership is liable, for compensatory and apparently, as well, punitive damages." *Shetka v. Kueppers, Kueppers, Von Feldt and Salmen*, 454 N.W.2d 916, 919 (Minn. 1990); *see* M.S.A. § 323A.0305.

The liability of a partner is imputed to the other partners in a partnership. M.S.A. § 323A.0305. The action of the partner committing the tort must also be in the course and scope of the partner's authority. Id. Partners are jointly and severally liable for everything chargeable to the partnership under section 323A.0305. *See* M.S.A. § 323A.0306(a); *Midland Nat'l Bank v. Perranoski*, 299 N.W.2d 404, 411, n. 5 (Minn. 1980).

The Uniform Limited Partnership Act contains similar provisions. Section 321.0303 of the Uniform Limited Partnership Act provides that:

> An obligation of a limited partnership, whether arising in contract, tort, or otherwise, is not the obligation of a limited partner. A limited partner is not personally liable, directly or indirectly, by way of contribution or otherwise, for an obligation of the limited partnership solely by reason of being a limited partner, even if the limited partner participates in the management and control of the limited partnership.

Section 321.0403(a) provided that "[a] limited partnership is liable for loss or injury caused to a person, or for a penalty incurred, as a result of a wrongful act or omission, or other actionable conduct, of a general partner acting in the ordinary course of activities of the limited partnership or with authority of the limited partnership." Section 321.0404, subject to certain exceptions, provides that "all general partners are liable jointly and severally for all obligations of the limited partnership unless otherwise agreed by the claimant or provided by law."

Joint Enterprises and Ventures. Fault may also be imputed in cases involving joint ventures and enterprises. A joint enterprise has two elements: (1) a mutual understanding for a common purpose; and (2) a right to a voice in the direction and control of the means used to carry out the common purpose. *Delgado v. Lohmar*, 289 N.W.2d 479, 482 (Minn. 1979).

A joint enterprise must be distinguished from a joint venture. *Delgado v. Lohmar*, 289 N.W.2d 479, 482 (Minn. 1979). There are four elements to a joint venture:

> (a) Contribution—the parties must combine their money, property, time, or skill in some common undertaking, but the contribution of each need not be equal or of the same nature.
>
> (b) Joint proprietorship and control—there must be a propri-

etary interest and right of mutual control over the subject matter of the property engaged therein.

(c) Sharing of profits but not necessarily losses—there must be an express or implied agreement for the sharing of profits (aside from profits received in payment of wages as an employee) but not necessarily of the losses.

(d) Contract—there must be a contract, whether express or implied, showing that a joint adventure was in fact entered into.

Meyers v. Postal Finance Co., 287 N.W.2d 614, 617–618 (Minn. 1979), *citing Rehnberg v. Minnesota Homes*, 236 Minn. 230, 235–236, 52 N.W.2d 454, 457 (1952). *See also Krengel v. Midwest Automatic Photo Inc.*, 295 Minn. 200, 209, 203 N.W.2d 841, 847 (1973).

In cases involving claims against corporations, the fault of a corporate employee is imputed to the corporation. Corporations are subject to the usual master-servant rules that govern course and scope of employment issues. *Melady v. South St. Paul Live Stock Exchange*, 142 Minn. 194, 197, 171 N.W. 806, 807 (1919).

Impact of Imputed Fault. In cases where there are multiple parties, and a party is held liable on the basis of negligence that is imputed to it because of its relationship with another defendant, the one who engaged in the negligent conduct and the defendant who is vicariously liable "are to be treated as one party for purposes of determining the fair share of the verdict each defendant must pay." *Larsen v. Minneapolis Gas Co.*, 282 Minn. 135, 150, 163 N.W.2d 755, 765 (1968). The same concept applies in cases where there is a joint venture. In those cases, the fault of the parties to a joint venture will be aggregated for purposes of comparison to the fault of the plaintiff. *See Krengel v. Midwest Automatic Photo, Inc.*, 295 Minn. 200, 208, 203 N.W.2d 841, 846 (1973). The same result should follow in joint enterprise cases.

A finding of vicarious liability by virtue of the relationship of the parties will not preclude a finding of direct liability. Thus, an employer who is found vicariously liable for the acts of an employee may also be found directly liable. For example, in a case involving a claim by a third party who is intentionally injured by an employee, the employer may be held vicariously liable under the *Aubert-Marston-Lange* standards. The employer may also be held liable for negligently hiring the employee. *E.g., Ponticas v. K.M.S. Investments*, 331 N.W.2d 907, 911 (Minn. 1983).

CIVJIG 30.10

DEFINITION—INDEPENDENT CONTRACTOR—EMPLOYEE

Definition of an "independent contractor"

> An independent contractor agrees to work for (a person) (an entity). The (person) (entity) does not actually control, and does not have the right to control, how the independent contractor performs the work.

Definition of an "employee"

> An employee is hired by an employer to perform work for him or her. The employer actually controls, and has the right to control, how the employee performs the work.

USE NOTE

The determination of whether a person is an employee or independent contractor is usually a question of fact. Where the issue is whether a person is an employee or independent contractor, both definitions would be used.

The determinative question will usually be the right of control over the means and manner in which the employee does the work, although there may be several factors that will be relevant to that determination. Because of the variance in factual patterns that raise the issue, this instruction focuses on actual control and the right of control. Depending on the circumstances, it may be appropriate to instruct the jury on other relevant factors that relate to the control issue. Those factors are noted in greater detail in the Authorities.

AUTHORITIES

The Restatement (Second) of Agency § 2(3), which was adopted in *Burman Co. v. Zahler*, 286 Minn. 400, 403, 178 N.W.2d 234, 238 (1970), reads as follows:

> An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking. He may or may not be an agent.

The Restatement (Second) of Agency § 2 (1958) defines a servant as "an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right of control by the master." The Restatement uses the terms "master" and "servant" to "indicate the relationship from which arises both the liability of an employer for the physical harm caused to third persons by the tort of an employee * * * and the special duties and immunities of an employer to the employee."

The most frequently cited test for distinguishing an independent contractor from an employee derives from *Guhlke v. Roberts Truck Lines*, 268 Minn. 141, 143, 128 N.W.2d 324, 326 (1964):

> * * * It is conceded that the factors applied in testing the relationship are: (1) the right to control the means and manner of performance; (2) the mode of payment; (3) the furnishing of materials or tools; (4) the control of the premises where the work is done; and (5) the right of the employer to discharge. In determining whether the status is one of employee or independent contractor, the most important factor considered in light of the nature of the work involved is the right of the employer to control the means and manner of performance.

See also Iverson v. Independent School Dist. No. 547, 257 N.W.2d 572, 573 (Minn. 1977); *Wangen v. City of Fountain*, 255 N.W.2d 813, 815 (Minn. 1977); *Ossenfort v. Associated Milk Producers, Inc.*, 254 N.W.2d 672, 676 (Minn. 1977).

Restatement (Second) of Agency § 2 (1958), sets out the following list of factors for making the determination:

> (2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:
>
> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
>
> (b) whether or not the one employed is engaged in a distinct occupation or business;
>
> (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
>
> (d) the skill required in the particular occupation;
>
> (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
>
> (f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

The supreme court has indicated its reliance on sections 2 and 220 of the Restatement in deciding whether a person is an employee or independent contractor. However, there is no exclusive test for making that determination:

> No single test is available for determining [the employer-employee] relationship. The question has been a fruitful source of litigation over the years. We have had occasion from time to time to consider a wide variety of facts in seeking an answer to this problem. The facts are seldom the same. Whether we apply the right of control or any other test, it is evident that no single factor standing alone will suffice. It is necessary to examine the overall relationship between the parties to determine whether the necessary contacts exist between them to establish one relationship or the other. For the most part we have followed the tests suggested by Restatement, Agency (2d) §§ 2 and 220.

Boland v. Morrill, 270 Minn. 86, 91, 132 N.W.2d 711, 715 (1965).

The court has also stated that the most important element is the right to control the physical movements of the employee in determining status. It is the right to control, rather than the exercise of the right to control, that is critical to the determination. *Boland*, 270 Minn. at 93, 270 Minn. 86, 132 N.W.2d 711, 715.

The employment status issue is one of fact. *Ossenfort*, 254 N.W.2d at 676; *Hagberg v. Colonial & Pacific Frigidways, Inc.*, 279 Minn. 396, 157 N.W.2d 33 (1968). "It is for the trier of fact to distinguish between the 'right-to-control' characteristic of an employer-employee relationship and the fact of powerful influence not inconsistent with an independent-contractor relationship." *Ossenfort*, 254 N.W.2d at 676.

Research References

West's Key Number Digest
Labor and Employment ⚷28, 140(3)

CIVJIG 30.15

EMPLOYEE—ISSUE AS TO SCOPE OF AUTHORITY—NEGLIGENCE

Scope of authority

An employee acts within the scope of his or her authority if:

1. The employee's conduct was substantially within work related limits of time and place; and
2. The employee's conduct is of a kind authorized by the employer or reasonably related to that employment; and
3. The employee's act was motivated at least in part by the employee's desire to further the employer's interests; and
4. The employer should have foreseen the employee's conduct, given the nature of the employment and the duties relating to it.

USE NOTE

The standard for determining whether there is vicarious liability in negligence or non-intentional tort cases differs from the standard used to determine vicarious liability in intentional torts cases. In cases involving negligence claims, the employee must act in part out of a desire to serve the employer.

AUTHORITIES

The general rule is that a master is liable for the torts of a servant committed in the course and scope of employment. *Edgewater Motels, Inc. v. Gatzke*, 277 N.W.2d 11, 15 (Minn. 1979); *Ismil v. L.H. Sowles Co.*, 295 Minn. 120, 123, 203 N.W.2d 354, 357 (1972); *Porter v. Grennan Bakeries, Inc.*, 219 Minn. 14, 18–19, 16 N.W.2d 906, 908–09, (1944). This is the doctrine of respondeat superior. Id. In order to apply the doctrine and hold the master liable, it must be shown that the tortious act of the servant was committed within the scope of his employment. *Laurie v. Mueller*, 248 Minn. 1, 4, 78 N.W.2d 434, 437 (1956); *Rampi v. Vevea*, 229 Minn. 11, 15–16, 38 N.W.2d 297, 299–300 (1949); *Plotkin v.*

Northland Transp. Co., 204 Minn. 422, 424–26, 283 N.W. 758, 759–60 (1939); *Elliason v. Western Coal & Coke Co.*, 162 Minn. 213, 215–16, 202 N.W. 485, 486–87 (1925).

Whether an act was committed "within the scope of employment" depends upon the circumstances of each individual case. *Edgewater Motels, Inc. v. Gatzke*, 277 N.W.2d 11, 15 (Minn. 1979); *Seidl v. Trollhaugen, Inc.*, 305 Minn. 506, 508, 232 N.W.2d 236, 240 (1975); *Nelson v. Nelson*, 282 Minn. 487, 489, 166 N.W.2d 70, 73 (1969); *Laurie v. Mueller*, 248 Minn. 1, 78 N.W.2d 434 (1956). It is impossible to derive a concrete definition of the term. *See* id.; *McLaughlin v. Cloquet Tie & Post Co.*, 119 Minn. 454, 458, 138 N.W. 434, 436–37 (1912).

The first inquiry in determining whether an act is within the scope of employment is " 'whether the servant was at the time engaged in serving his master' " or whether he was " 'at liberty from the service, and pursuing his own ends exclusively.' " *Kuehmichel v. Western Union Teleg. Co.*, 125 Minn. 74, 76, 145 N.W. 788, 789 (1914). Put another way, the question is whether the employee's "conduct was, to some degree, in furtherance of the interests of his employer." *Edgewater Motels, Inc., v. Gatzke*, 277 N.W.2d 11, 15 (Minn. 1979). If so, the employer is liable. The fact that the servant may have exceeded his authority in committing the tort, or even disobeyed an express instruction, makes no difference. *Sina v. Carlson*, 120 Minn. 283, 285–86, 139 N.W. 601, 602 (1913). A crucial factor is the state of the servant's mind. Restatement (Second) of Agency § 235 cmt. a (1958); *see Laurie v. Mueller*, 248 Minn. 1, 5, 78 N.W.2d 434, 437 (1956). The act is within the scope of employment if the employee's conduct was in furtherance of the employer's interests, to some degree. *Edgewater Motels, Inc. v. Gatzke*, 277 N.W.2d 11, 15 (Minn. 1979). The court in *Gatzke* summarized the standards:

> "An act of a servant is not within the scope of employment if it is done with no intention to perform it as a part of or incident to a service on account of which he is employed." Other factors to be considered in the scope of employment determination are whether the conduct is of the kind that the employee is authorized to perform and whether the act occurs substantially within authorized time and space restrictions. *Boland v. Morrill*, 270 Minn. 86, 132 N.W.2d 711 (1965); Restatement, Agency 2d, § 228. No hard and fast rule can be applied to resolve the "scope of employment" inquiry. Rather, each case must be decided on its own individual facts . . . .

277 N.W.2d at 15.

"Scope of employment" is immaterial where the liability of the master rests, not upon the doctrine of "respondeat superior," but upon personal fault in exposing others to unreasonable risk of injury, such as by hiring an agent known to be violent, *see Porter v. Grennan Bakeries*, 219 Minn. 14, 22–23, 16 N.W.2d 906, 910 (1944); or failing to check the background of an employee with a criminal history. *See Ponticas v. K.M.S. Investments*, 331 N.W.2d 907, 912 (Minn. 1983).

Research References

West's Key Number Digest
Labor and Employment ⚷3125, 3181(7)

CIVJIG 30.20

EMPLOYEE—ISSUE AS TO SCOPE OF AUTHORITY—INTENTIONAL WRONG

Scope of authority

An employee acts within the scope of his or her authority if:

1. The employee's conduct was substantially within work-related limits of time and place; and
2. The employee's conduct is of a kind authorized by the employer or reasonably related to that employment; and
3. The employer should have foreseen the employee's conduct given the nature of the employment and the duties relating to it.

USE NOTE

This instruction is intended for use in cases involving intentional wrongs committed by an employee. The standard is formulated differently than the standard applicable to non-intentional torts, insofar as it is unnecessary to establish that the employee was acting in furtherance of his or her employer's interests at the time the tort was committed.

AUTHORITIES

In *Marston v. Minneapolis Clinic of Psychiatry*, 329 N.W.2d 306, 309 (Minn. 1982) (modified on denial of rehearing, Minn. 1983); and *Lange v. National Biscuit Co.*, 297 Minn. 399, 403–404, 211 N.W.2d 783, 785 (1973), the Minnesota Supreme Court took the position that an employee does not have to be motivated by a desire to further the employer's interests in order for the employer to be vicariously liable for the acts of the employee who commits an intentional tort. In *Marston*, the court suggested an instruction somewhat different from the negligence instruction for purposes of determining whether the employer is liable for the intentional torts of the employee. *See* 329 N.W.2d at 311, n. 3. The critical issue is whether the employee's acts were reasonably incidental to his employment and were within work-related limits of time and place. *See Marston v. Minneapolis Clinic of Psychiatry*, 329 N.W.2d 306, 310 (Minn. 1982); *Lange v. National Biscuit Co.*, 297 Minn. 399, 403, 211 N.W.2d 783, 785 (1973).

In *P.L. v. Aubert*, 545 N.W.2d 666, 667 (Minn. 1996) (high school teacher engaged in sexual conduct with student), the court reaffirmed the *Marston-Lange* standards, which required that the intentional act of the employee be related to the duties of the employee and that the acts occur "within work related limits of time and place." *Lange*, 297 Minn. at 405, 211 N.W.2d at 786.

In explaining *Marston*, the court emphasized the importance of finding that acts of an employee are foreseeable to an employer:

> In that situation we stated that "it should be a question of fact whether the acts of [defendant] were foreseeable, related to and connected with acts otherwise within the scope of employment." . . . This issue of foreseeability was raised because of expert testimony at the lower court that sexual relations between doctors and patients was a "well-known hazard and thus . . . foreseeable." . . . It was the foreseeability of the risk that determined the outcome of the *Marston* case.

Id. at 667–68.

The court distinguished *Marston* in concluding that there was no vicarious liability on the part of the school for the acts of the teacher:

> Here we find no evidence that such relationship between teacher and student are a "well-known hazard"; thus foreseeability is absent. While it is true that teachers have power and authority over students, no expert testimony or affidavits were presented regarding the potential for abuse of such power in these situations; thus there can be no implied foreseeability.
>
> The master is liable for any such act of the servant which, if isolated, would not be imputable to the master, but which is so connected with and immediately grows out of another act of the servant imputable to the master, that both acts are treated as one indivisible tort . . . . Here, the sexual contact by the teacher toward the student could not be considered an "indivisible" act directly related to her teaching duties. Thus liability of the master cannot be imputed, even though the acts were committed with work related time and place.

Id. at 668.

In *Fahrendorff v. North Homes, Inc.*, 597 N.W.2d 905 (Minn. 1999), the court examined the vicarious liability standards in a case involving intentional misconduct of an employee of the defendant who allegedly sexually assaulted a teenager staying in the home. The court reaffirmed the basic standard in *Lange v. National Biscuit Co.*, 297 Minn. 399, 404, 211 N.W.2d 783, 785 (1973), that the source of the assault must be related to the employee's duties, and that it occur "within work-related limits of time and place."

The court also noted its decision in *P.L. v. Aubert*, 545 N.W.2d 666 (Minn. 1996), and its emphasis on the foreseeability issue as determinative of the outcome of that case. *Aubert* involved the issue of whether a school district could be held liable for the conduct of a teacher who had sexual relations with a minor student at school. The court affirmed summary judgment in favor of the school, holding that the teacher's conduct did not fall within the scope of her employment. In *Fahrendorff*, the court said that its decision in *Aubert* was based solely on the lack of evidence presented in that case showing that sexual assaults of students by teachers were a "well-known hazard."

In discussing the facts of the case, the *Fahrendorff* court focused on the foreseeability issue:

> Examining the evidence in the light most favorable to Fahrendorff, we conclude that a reasonable jury could find that the source of Kist's assault was related to the duties of his employment. Although Kist's sexual assault of Fahrendorff was criminal and personally motivated, the lower courts erred in relying on those factors to grant North Homes' motion for summary judgment. As we held in Marston, just because an employee's ultimate actions may be motivated by personal gratification and prohibited by the employer does not mean that those actions fall outside the scope of employment as a matter of law . . . . Rather, it is a question of fact whether the employee's acts were foreseeable, related to, and connected with acts otherwise within the scope of his employment.

597 N.W.2d at 911 (citations omitted).

The court specifically noted the role of foreseeability in vicarious liability cases, and the type of evidence necessary to establish foreseeability. The court concluded that the evidence raised a fact question as to "the foreseeability of sexual abuse in the group homes industry." 597 N.W.2d at 911. Also, while the court noted that the affidavits in the case concerning the foreseeability of sexual assaults in group homes were not specific to the employee and group home involved in the case, it was unnecessary for the evidence to be specific:

> Contrary to liability based on negligence, liability based on respondeat superior stems from public policy rather than from any fault of the employer . . . . If we were to predicate liability in respondeat superior cases upon a showing that the employer should have reasonably anticipated the employee's specific misconduct, this distinction would be lost. Accordingly, other jurisdictions that, like us, use foreseeability as a consideration in determining respondeat superior liability, have distinguished the degree of foreseeability required in the respondeat superior cases from that required in direct negligence cases:
>
> "Foreseeability" in this context must be distinguished from "foresee-

> ability" as a test for negligence. In the latter sense, "foreseeable" means a level of probability which would lead a prudent person to take effective precautions whereas "foreseeability" as a test for respondeat superior merely means that in the context of the particular enterprise an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business.

597 N.W.2d at 912, citing *Rodgers v. Kemper Constr. Co.*, 50 Cal.App.3d 608, 124 Cal.Rptr. 143, 148–49 (Cal.App. 1975).

Applying the law to the specific facts of the case, the Minnesota Supreme Court concluded that a fact question existed concerning the employee's conduct:

> Here, [the expert's] affidavit stated that sexual abuse by group home parents, although infrequent, is a "well known hazard" in the group home industry. This sworn statement suggests that sexual abuse by a group home parent is sufficiently common in the group home industry that, as a matter of fairness, an employer engaged in that business should bear the loss associated with such abuse as a foreseeable cost of doing business. Thus, as we recognized in Marston, testimony such as Krueger's does create a genuine issue of fact as to whether an employee's tort is foreseeable.
>
> While the above evidence is not conclusive proof that Kist's acts were within the scope of his employment, we hold, as we did in Marston, that the evidence does raise a question of fact as to whether Kist's wrongful acts were foreseeable, related to and connected with acts otherwise within the scope of employment. Accordingly, we . . . remand the case for trial.

597 N.W.2d at 912–13.

In *L.M. v. Karlson*, 646 N.W.2d 537, 543 (Minn. Ct. App. 2002), the court of appeals applied *Fahrendorff* in holding that the plaintiff presented sufficient evidence of the foreseeability of sexual abuse of a child in a day-care center by providing the affidavit of an expert witness who indicated in her affidavit that abuse by day-care employees who are in direct contact with children is foreseeable. The court noted that her affidavit was "conclusory and lacking in specific examples," but that similar problems did not prevent the Minnesota Supreme Court in other cases, including *Fahrendorff*, from holding that such affidavits are sufficient to create a question of material fact on the issue, making summary judgment inappropriate.

In *Frieler v. Carlson Marketing Group, Inc.*, 751 N.W.2d 558 (Minn. 2008), the plaintiff brought suit against her former employer claiming sexual harassment in violation of the Minnesota Human Rights Act, assault, battery, and negligent supervision and retention. The court held that a plaintiff who brings a sexual harassment claim under the Minnesota Human Rights Act against her employer for sexual harassment by a supervisor "is not required to prove that his or her employer knew or should have known about the sexual harassment and failed to take timely and appropriate action." 751 N.W.2d at 567.

The court held that the standard for imposing liability is not a strict liability standard, however. The court applied agency concepts, noting that while sexual harassment by a supervisor is not conduct within the scope of employment, liability may be supported under the Restatement (Second) of Agency § 291(2)(d), providing that a master is subject to liability if "the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation." The court held "that an employer is subject to vicarious liability for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over a victimized employee." 751 N.W.2d at 570.

The employer may establish an affirmative defense to liability or damages if it proves by a preponderance of evidence that the employer used reasonable care to prevent and correct the harassing behavior and that the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities. The defense is unavailable if the supervisor's harassment culminated in a tangible employment action, such as discharge, demotion, or undesirable assignment.

The court held that the issue of whether a person is a supervisor is controlled by EEOC standards, which state that an employee is considered a supervisor if the employee "has authority to undertake or recommend tangible employment decisions affecting the employee" or the individual has authority "to direct the employee's daily work activities."

Justice Gildea, writing for the majority on the assault and battery issue, noted that the Minnesota cases "clearly hold that a plaintiff must present some evidence that an employee's sexual misconduct was foreseeable to survive summary judgment on a claim of respondeat superior liability for an intentional tort." *Id.* at 583. The court held that the plaintiff presented insufficient evidence to permit a reasonable jury to conclude that the supervisor's acts of assault and battery were foreseeable. *Id.*

In *Hartford Fire Insurance Co. v. Lawrence*, 727 F.Supp.2d 765 (D. Minn. 2010), the court emphasized the importance of the foreseeability requirement in determining whether an employer may be held liable for the intentional torts of an employee. The case arose out of a fraud scheme based upon overbilling of transportation costs perpetuated by employees of two different companies. Hartford, the subrogee of the company that sustained the loss, brought suit against various defendants, including Transgroup Express, arguing among other theories that Transgroup was vicariously liable for the overbilling fraud perpetuated by an employee of a company that provided shipping services for Hartford's insured, using Transgroup for interstate shipments.

In determining whether Transgroup could be held liable, the district court emphasized the importance of the foreseeability requirement in resolving vicarious liability issues. *Id.* at 770–71, citing *Frieler*, 751 N.W.2d at 582–84 (Gildea, J., opinion and dissent, Part II, writing for the court on this issue); *Yath v. Fairview Clinics, N.P.*, 767 N.W.2d 34, 47 (Minn. Ct. App.2009) (labeling foreseeability the "critical inquiry" in deciding whether an intentional tort was committed within the scope of employment); and *Buckles v. State*, 2009 WL 2498635, at *2–4 (Minn. Ct. App. Aug. 18, 2009), rev. denied (Minn. Oct. 28, 2009) (prison contractor not liable criminal sexual conduct by female food supervisor with prisoner because it was not a well-known hazard in prisons and there was insufficient evidence to show that the conduct was specifically foreseeable).

The court held that there was sufficient evidence of unusually high markups by the shipping company that contracted with Transgroup to raise a fact question concerning the foreseeability of fraudulent conduct. *Id.* at 772.

Research References

West's Key Number Digest
Labor and Employment ⚷3125, 3181(7)

CIVJIG 30.25

PRINCIPAL AND AGENT RELATIONSHIP

Definition of "principal" and "agent"

[An "agent" is a person who is authorized to act for a principal.]

A principal-agent relationship exists when there is:

1. An agreement that one person will act for another, and

2. An understanding that the person who authorizes the other to act is in control of the undertaking.

A person who agrees to act for the other is the "agent." The person who authorizes the act is the "principal."

[An independent contractor may be an agent.]

USE NOTE

This instruction should be used only where the existence of a principal-agent relationship is in dispute.

AUTHORITIES

In *A. Gay Jenson Farms Co. v. Cargill, Inc.*, 309 N.W.2d 285, 290 (Minn. 1981), the Minnesota Supreme Court followed the Restatement (Second) of Agency § 1, in defining agency:

> Agency is the fiduciary relationship that results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act. *Jurek v. Thompson*, 308 Minn. 191, 241 N.W.2d 788 (1976); *Lee v. Peoples Cooperative Sales Agency*, 201 Minn. 266, 276 N.W. 214 (1937); Restatement (Second) of Agency § 1 (1958). In order to create an agency there must be an agreement, but not necessarily a contract between the parties. Restatement (Second) of Agency § 1, comment b (1958). An agreement may result in the creation of an agency relationship although the parties did not call it an agency and did not intend the legal consequences of the relation to follow. *Id.* The existence of the agency may be proved by circumstantial evidence which shows a course of dealing between the two parties.

Rausch v. Aronson, 211 Minn. 272, 1 N.W.2d 371 (1941). When an agency relationship is to be proven by circumstantial evidence, the principal must be shown to have consented to the agency since one cannot be the agent of another except by consent of the latter. *Larkin v. McCabe*, 211 Minn. 11, 299 N.W. 649 (1941).

The creation of an agency relationship does not have to be in writing. If the evidence is conflicting, the existence of the agency relationship is a question of fact for the trier of fact. *PMH Properties v. Nichols*, 263 N.W.2d 799, 803 (Minn. 1978).

Research References

West's Key Number Digest
Principal and Agent 🔑1, 7, 14, 194(1)

Legal Encyclopedias
C.J.S., Agency §§ 1, 3 to 6, 8, 11, 24, 29 to 30, 32 to 38, 43 to 47, 581; Architects §§ 15, 20

CIVJIG 30.30

PRINCIPAL AND AGENT—SCOPE OF AUTHORITY

Scope of authority

> An agent acts within the scope of his or her authority if he or she has the express or implied authority to act for the employer.
>
> Implied authority to act can be determined by the course or pattern of dealing between the principal and agent.

USE NOTE

If an agent meets the definition of a servant (employee), the scope of authority jury instructions in CIVJIG 30.15 and 30.20 should be utilized. If the agent does not meet that definition, and there is a question as to whether the agent acted in the scope of his or her agency, this instruction should be used. The determinative factor distinguishing a servant from an agent will be the right of physical control over how the job is done.

Note that this is a limited instruction. Principal-agent relationships may be complex, and it may be desirable to elaborate on this instruction in appropriate cases.

AUTHORITIES

It is important to differentiate a principal's responsibility for the actions of an agent from the responsibility of an employer for the acts of an employee. The Restatement (Second) of Agency § 2, utilizes the following definitions:

> (1) A master is a principal who employs an agent to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service.
>
> (2) A servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master.
>
> (3) An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his

> physical conduct in the performance of the undertaking. He may or may not be an agent.

The Restatement uses the term "master" and "servant" to indicate an employment relationship that gives rise to vicarious liability on the part of the employer for the physical harm caused to others by the torts of an employee. *Id.*, comment a. A principal is not vicariously liable for the tortious actions of an agent that result in physical harm to others unless the agent is a servant. The key factor is the principal's right to control the physical actions of the agent.

The Restatement uses the word "agent" as follows:

> "Agent" is a word used to describe a person authorized by another to act on his account and under his control. Included within its meaning are those who, whether or not servants as described in Section 2, act in business transactions and those who perform only manual labor as servants. An agent may be one for whose physical acts the employer is not responsible and who is called an independent contractor in order to distinguish him from a servant, also an agent, for whose physical acts the employer is responsible. Thus, the attorney-at-law, the broker, the factor, the auctioneer, and other similar persons employed either for a single transaction or for a series of transactions, are agents, although as to their physical activities they are independent contractors. These are to be contrasted with others, such as clerks, train conductors, and others who conduct transactions with third persons but who fall within the category of servants. Likewise, the janitor of a building or the driver of a truck is an agent, as that word is used in the Restatement of this Subject, if he is employed under such circumstances that he becomes a servant. For many purposes it is immaterial whether or not one who is an agent is also a servant. However, the liability of a master for the torts of his servant is greater in extent than the liability of a principal for the torts of an agent who is not a servant * * * .

In general, "a principal is liable for the acts of an agent committed in the course and within the scope of the agency and not for a purpose personal to the agent." *Semrad v. Edina Realty, Inc.*, 493 N.W.2d 528, 535 (Minn. 1992). A principal is not liable for the unauthorized intentional torts of an agent. *Id.*; *Kasner v. Gage*, 281 Minn. 149, 152–53, 161 N.W.2d 40, 43 (1968).

Restatement (Second) of Agency § 140, defines the liability of a principal's liability to a third person for an agent's actions:

> The liability of the principal to a third person upon a transaction conducted by an agent, or the transfer of his interests by an agent, may be based upon the fact that:

(a) the agent was authorized;

(b) the agent was apparently authorized; or

(c) the agent had a power arising from the agency relation and not dependent upon authority or apparent authority.

The liability of a principal depends on the scope of the agent's authority. The agent's authority may be express or implied. *Hockemeyer v. Pooler*, 268 Minn. 551, 565, 130 N.W.2d 367, 377 (1964):

> The agent's actual authority consists of express and implied authority. Express authority is that authority which the principal directly grants to the agent. Implied authority includes only those powers which are essential to carry out the duties expressly delegated. The agent's authority cannot be greater than the authority of the principal.

See also Mooney v. Jones, 238 Minn. 1, 9, 54 N.W.2d 763, 767 (1952); *Amdahl v. Stonewall Ins. Co.*, 484 N.W.2d 811, 814 (Minn. Ct. App. 1992), rev. denied (Minn. July 16, 1992). Put another way, implied authority is actual authority that is circumstantially proved. *Derrick v. Drolson Co.*, 244 Minn. 144, 152, 69 N.W.2d 124, 130 (1955); *see also Schlick v. Berg*, 205 Minn. 465, 468–69, 286 N.W. 356, 358 (1939) (implied authority is actual authority that may be inferred from a course of dealing between the principal and agent).

The requirements of apparent authority are as follows:

> The principal must have held the agent out as having authority, or must have knowingly permitted the agent to act on its behalf; furthermore, the party dealing with the agent must have actual knowledge that the agent was held out by the principal as having such authority or had been permitted by the principal to act on its behalf; and the proof of the agent's authority must be found in the conduct of the principal, not the agent.

Foley v. Allard, 427 N.W.2d 647, 652 (Minn. 1988); *Truck Crane Service Co. v. Barr-Nelson, Inc.*, 329 N.W.2d 824, 826 (Minn. 1983). "While apparent authority is usually based on some affirmative action on the part of the principal, authority may be found when the agent has regularly exercised some power not expressly given to it and the principal, knowing of the practice, tacitly sanctions its continuance." *Vacura v. Haar's Equipment, Inc.*, 364 N.W.2d 387, 391 (Minn. 1985).

Research References

West's Key Number Digest
Principal and Agent ⚷49, 194(2)

Legal Encyclopedias
C.J.S., Agency §§ 131 to 132, 581

CIVJIG 30.50

PARTNERSHIP—PARTNERS—DEFINITION

Definition of a "partnership"

A "partnership" is an association of two or more persons who are co-owners of a business for profit.

Definition of a "partnership agreement"

A "partnership agreement" is the partners' agreement concerning the partnership.

This agreement includes any amendments to it.

The agreement may be written or oral. It may be express or implied.

USE NOTE

The definitions of "partnership" and "partnership agreement" are taken from the Uniform Partnership Act (1994). The definition of "partnership" is similar to the definition in the Uniform Partnership Act.

AUTHORITIES

The Minnesota Uniform Partnership Act, M.S.A. §§ 323A.0101–323A.1203, defines a partnership as "an association of two or more persons to carry on as co-owners of a business for profit, including a limited liability partnership, formed under section 323A.0202, predecessor law, or comparable law of another jurisdiction." *Id.* § 323A.0101(8).

"Partnership agreement" is defined as "the agreement, whether written, oral, or implied, among the partners concerning the partnership, including amendments to the partnership agreement." Id. § 323A.1-01(9).

In order to establish a partnership, the evidence must show that the parties have expressly or impliedly entered into a contractual relationship whereby they have combined their property, labor, and skill for the purpose of joint profit. *Cyrus v. Cyrus*, 242 Minn. 180, 184, 64 N.W.2d 538, 541 (1954); *Blumberg v. Palm*, 238 Minn. 249, 252, 56 N.W.2d 412, 414 (1953); *Hamilton v. Boyce*, 234 Minn. 290, 291, 48

N.W.2d 172, 173 (1951). It is essential to the existence of a partnership that there be a joint contribution to the enterprise and something in the nature of a community of interest. *Hansen v. Adent*, 238 Minn. 540, 545, 57 N.W.2d 681, 684 (1953); *Hammel v. Feigh*, 143 Minn. 115, 118, 173 N.W. 570, 571 (1919).

While the sharing of profits no longer constitutes a conclusive test as to whether a partnership exists, *Moore v. Thorpe*, 133 Minn. 244, 250, 158 N.W. 235, 238 (1916), the receipt of a share of the profits is prima facie evidence that the recipient is a partner. M.S.A. § 323A.0202(c)(3).

Intent is an essential element of the partnership relation. It is the intent to do those things that constitute a partnership that determines whether a partnership relation exists. It is the substance and not the form of the arrangement that is critical. *Nelson v. Seaboard Surety Co.*, 269 F.2d 882, 887 (8th Cir. 1959); *McDonald Bros. v. Campbell & Bergeson*, 96 Minn. 87, 89–90, 104 N.W. 760, 761 (1905). Thus, when parties contribute their experience, capital, and energies to a common enterprise in which they share the profits, a partnership may result, notwithstanding an expressed intention not to create that relationship. *Hansen v. Adent*, 238 Minn. 540, 544, 57 N.W.2d 681, 684 (1953).

There is no arbitrary test to be applied in determining whether a partnership relation exists between the parties. Each case must be decided upon the basis of its own peculiar facts. *Wormsbecker v. Donovan Const. Co.*, 251 Minn. 277, 284, 87 N.W.2d 660, 664 (1958); *Cyrus v. Cyrus*, 242 Minn. 180, 183, 64 N.W.2d 538, 541 (1954); *Hansen v. Adent*, 238 Minn. 540, 545, 57 N.W.2d 681, 684 (1953); *Blumberg v. Palm*, 238 Minn. 249, 252, 56 N.W.2d 412, 414 (1953); *Hamilton v. Boyce*, 234 Minn. 290, 292, 48 N.W.2d 172, 174 (1951).

Research References

West's Key Number Digest
Partnership ⚷1, 21, 22, 218(2)

CIVJIG 30.55

PARTNERSHIP—SCOPE OF AUTHORITY—DEFINITION

Scope of authority

A partner is acting within the scope of the partnership authority if:

1. He or she is acting in the ordinary business of the partnership, or
2. He or she is acting with the authority of the partnership.

USE NOTE

The "ordinary course of business" standard is taken from the Uniform Partnership Act and the Uniform Partnership Act (1994). The standard has not been specifically defined in Minnesota. Because of potential differences in this standard and the standard used to defined scope of employment in cases involving an employee's scope of employment, the statutory standard is used without further definition.

AUTHORITIES

M.S.A. § 323A.0305 makes the partnership liable for the actionable conduct of a partner:

> (a) A partnership is liable for loss or injury caused to a person, or for a penalty incurred, as a result of a wrongful act or omission, or other actionable conduct, of a partner acting in the ordinary course of business of the partnership or with authority of the partnership.
>
> (b) If, in the course of the partnership's business or while acting with authority of the partnership, a partner receives or causes the partnership to receive money or property of a person not a partner, and the money or property is misapplied by a partner, the partnership is liable for the loss.

M.S.A. § 323A.0301 provides as follows:

> (1) Each partner is an agent of the partnership for the purpose of its business. An act of a partner, including the execution of an

> instrument in the partnership name, for apparently carrying on in the ordinary course the partnership business or business of the kind carried on by the partnership binds the partnership, unless the partner had no authority to act for the partnership in the particular matter and the person with whom the partner was dealing knew or had received a notification that the partner lacked authority.
>
> (2) An act of a partner which is not apparently for carrying on in the ordinary course the partnership business or business of the kind carried on by the partnership binds the partnership only if the act was authorized by the other partners.

Partners are jointly and severally liable for everything chargeable to the partnership under section 323.12. *See* M.S.A. § 323A.0306(a); *Midland Nat'l Bank v. Perranoski*, 299 N.W.2d 404, 411, n. 5 (Minn. 1980).

The decisions governing when an agent's conduct is within the scope of his or her authority are equally applicable to the scope of partnership business. *See* CIVJIG 30.30, Authorities.

Research References

West's Key Number Digest
Partnership ⚷126, 128, 129, 218(2)

CIVJIG 30.60

CORPORATIONS—LIABILITY FOR CONDUCT OF EMPLOYEES

Corporate responsibility for employees

(Name) is a corporation and can act only through its officers and employees.

The (negligence) (conduct) of an officer or employee acting within the scope of his or her (employment) (authority) is the (negligence) (conduct) of the corporation.

USE NOTE

Give CIVJIG 30.15 and 30.20 for the definition of scope of employment.

Research References

West's Key Number Digest
Corporations ⚷397 to 433(2), 488 to 498, 521

Legal Encyclopedias
C.J.S., Corporations §§ 586 to 643, 699 to 708

CIVJIG 30.65

JOINT ENTERPRISE

Definition of "joint enterprise"

A joint enterprise exists when:

1. Two or more persons have a mutual understanding for a common purpose, and
2. Each has a right to a voice in the direction and control of the means used to carry it out.

USE NOTE

This instruction is intended for use in cases where there is a jury issue as to whether there is a joint enterprise. Joint enterprises have to be distinguished from joint ventures, which are covered in CIVJIG 30.70.

AUTHORITIES

A joint enterprise must be distinguished from a joint venture. *See Delgado v. Lohmar*, 289 N.W.2d 479 (Minn. 1979). A joint enterprise has two elements: (1) a mutual understanding for a common purpose, and (2) a right to a voice in the direction and control of the means used to carry out the common purpose. Id. at 482. A business relationship is needed for a joint venture but not for a joint enterprise. *Delgado*, 289 N.W.2d at 482, n. 2 (Minn. 1979); *Olson v. Ische*, 343 N.W.2d 284, 288 (Minn. 1984). Pecuniary interest is a third element necessary in some states, but not in Minnesota. *Delgado*, 289 N.W.2d at 482 (Minn. 1980); *Pierson v. Edstrom*, 286 Minn. 164, 167, 174 N.W.2d 712, 714, n. 2 (1970). For the elements of a joint venture, *see* CIVJIG 30.70.

In a joint enterprise, each member of the enterprise is an agent of the other members of the enterprise. The acts of each member are the acts of all members of the enterprise. *Ruth v. Hutchinson*, 209 Minn. 248, 259, 296 N.W.2d 136, 141 (Minn. 1941); *Blohm v. Johnson*, 523 N.W.2d 14, 16–17 (Minn. Ct. App. 1994).

The supreme court has held that the fault of two or more defendants may be aggregated for purposes of comparison to the fault of the plaintiff where the defendants owe a joint duty to the plaintiff. *See Cambern v. Sioux Tools, Inc.*, 323 N.W.2d 795, 798 (Minn. 1982); *Krengel v. Midwest Automatic Photo, Inc.*, 295 Minn. 200, 208, 203 N.W.2d 841, 846 (1973).

The existence of a joint venture is a question of fact, and, in certain circumstances, failure to submit this issue to the jury may constitute a waiver, precluding plaintiff from asserting that the fault of defendants should be aggregated. *Hansen v. St. Paul Metro Treatment Center, Inc.*, 609 N.W.2d 625, 629 (Minn. Ct. App. 2000).

Research References

West's Key Number Digest

Automobiles ⚷198(4); Joint Adventures ⚷8; Negligence ⚷575

Legal Encyclopedias

C.J.S., Joint Ventures §§ 56, 62 to 67; Motor Vehicles §§ 832, 870, 973 to 977; Negligence §§ 268 to 280

CIVJIG 30.70

JOINT VENTURE—DEFINITION

Definition of a "joint venture"

A joint venture exists when two or more parties have a relationship that contains the following elements:

Contribution

1. The parties must combine their money, property, time, or skill in some common undertaking.

The contribution of each need not be equal or of the same nature.

Joint ownership and control

2. Each of them must have ownership of the property involved in the venture and the mutual right of control over that property.

Sharing of profits but not necessarily losses

3. There must be an express or implied agreement to share profits (aside from wages received as an employee), but not necessarily to share losses.

Contract

4. There must be a contract, either express or implied, showing that the parties in fact formed a joint venture.

USE NOTE

Give CIVJIG 30.15 and 30.20 for the definition of scope of employment. This instruction is intended for use in cases involving joint ventures. Joint ventures must be distinguished from joint enterprises.

AUTHORITIES

There are four elements to a joint venture:

(a) Contribution—the parties must combine their money, property, time, or skill in some common undertaking, but the contribution of each need not be equal or of the same nature.

(b) Joint proprietorship and control—there must be a proprietary interest and right of mutual control over the subject matter of the property engaged therein.

(c) Sharing of profits but not necessarily losses—there must be an express or implied agreement for the sharing of profits (aside from profits received in payment of wages as an employee) but not necessarily of the losses.

(d) Contract—there must be a contract, whether express or implied, showing that a joint adventure was in fact entered into.

Meyers v. Postal Finance Co., 287 N.W.2d 614, 617–618 (Minn. 1979), *citing Rehnberg v. Minnesota Homes*, 236 Minn. 230, 235–236, 52 N.W.2d 454, 457 (1952). *See also Krengel v. Midwest Automatic Photo Inc.*, 295 Minn. 200, 209, 203 N.W.2d 841, 847 (1973). Defendants in a joint venture are jointly liable as a unit, even though there is no actual physical control, and no right of direction and control was actually exercised. *Walton v. Fujita Tourist Enterprises Co.*, 380 N.W.2d 198, 202 (Minn. Ct. App. 1986), rev. denied (Minn. March 21, 1986).

A joint venture cannot exist where a corporation or technical partnership has been created. *Stelling v. Hanson Silo Co.*, 563 N.W.2d 286 (Minn. Ct. App. 1997). A joint venture must be distinguished from a joint enterprise. *See Delgado v. Lohmar*, 289 N.W.2d 479, 482 (Minn. 1979).

The fault of parties to a joint venture will be aggregated for purposes of comparison to the fault of the plaintiff. *See Krengel v. Midwest Automatic Photo, Inc.*, 295 Minn. 200, 208, 203 N.W.2d 841, 846 (1973).

Research References

West's Key Number Digest
Joint Adventures ⚷1.2, 8

Legal Encyclopedias
C.J.S., Joint Ventures §§ 8 to 9, 11 to 13, 56, 62 to 67

SPECIAL VERDICT FORMS

CIVSVF 30.90

VICARIOUS LIABILITY—SCOPE OF EMPLOYMENT; NEGLIGENCE

1. Was (defendant) negligent? ______________ Yes or No

2. *If your answer to Question 1 was "Yes," then answer this question*: Was this negligence by (defendant) a direct cause of the accident? ______________ Yes or No

3. Was (defendant) acting in the scope of (his) (her) authority for (defendant employer) at the time of the accident? ______________ Yes or No

4. Was (plaintiff) negligent? ______________ Yes or No

5. *If your answer to Question 4 was "Yes," then answer this question*: Was this negligence by (plaintiff) a direct cause of the accident? ______________ Yes or No

[If your answers to each of questions 1, 2, 4, and 5 were "Yes," then answer Question 6.]

6. Taking all of the negligence that contributed as a direct cause of the accident to be 100%, what percentage do you attribute to:

(Name of defendant) ________%

(Name of plaintiff) ________%

TOTAL 100%

USE NOTE

In cases where vicarious liability is in issue, the special verdict form must include a separate question that asks whether the employee was acting in the course and scope of his or her authority. For comparative fault purposes, only the fault of the employee needs to be submitted, irrespective of whether the employee is acting in the course and scope of his or her authority. If the employee acted negligently and in the scope of his or her authority, the employee's negligence would be imputed to the employer.

The special verdict questions and their supporting jury instructions are as follows:

1. CIVJIG 25.10: Negligence
2. CIVJIG 27.10: Direct Cause
3. CIVJIG 30.15: Scope of Responsibility
4. CIVJIG 25.10: Negligence
5. CIVJIG 27.10: Direct Cause
6. CIVJIG 28.15: Comparative Fault

AUTHORITIES

An employer is vicariously liable for the negligent acts of an employee who is acting in the course and scope of his or employment. *E.g., Edgewater Motels, Inc. v. Gatzke*, 277 N.W.2d 11, 15 (Minn. 1979); *Ismil v. L.H. Sowles Co.*, 295 Minn. 120, 123, 203 N.W.2d 354, 357 (1972); *Porter v. Grennan Bakeries, Inc.*, 219 Minn. 14, 21–22, 16 N.W.2d 906, 909–10 (1944).

CIVSVF 30.91

VICARIOUS LIABILITY—SCOPE OF EMPLOYMENT; NEGLIGENT HIRING OR RETENTION

1. Was (defendant) negligent in causing the accident?

____
Yes or No

2. *If your answer to Question 1 was "Yes," then answer this question:* Was this negligence by (defendant) a direct cause of the accident?

____
Yes or No

3. Was (defendant) acting in the scope of (his) (her) authority for (defendant employer) at the time of the accident?

____
Yes or No

4. Was (defendant employer) negligent in (hiring) (retaining) (defendant employee)?

____
Yes or No

5. *If your answer to Question 4 was "Yes," then answer this question*: Was (employer's) negligence a direct cause of (plaintiff's) accident?

____
Yes or No

6. Was (plaintiff) negligent?

____
Yes or No

7. *If your answer to Question 6 was "Yes," then answer this question:* Was (plaintiff's) negligence a direct cause of the accident?

____
Yes or No

[If your answers to two or more of questions 2, 5, and 7 were "Yes," then answer Question 8.]

8. Taking all of the negligence that contributed as a direct cause of the accident to be 100%, what percentage do you attribute to:

(defendant)
If you answered "Yes" to Question 2 ________%

(defendant employer)
If you answered "Yes" to Question 5 ________%

(plaintiff)
If you answered "Yes" to Question 7 ________%

TOTAL 100%

USE NOTE

In cases where vicarious liability is in issue, the special verdict form must include a separate question that asks whether the employee was acting in the course and scope of his or her authority. For comparative fault purposes, only the fault of the employee needs to be submitted, irrespective of whether the employee is acting in the course and scope of his or her authority. If the employee acted negligently and in the scope of his or her authority, the employee's negligence would be imputed to the employer. In addition to being vicariously liable, the employer may also be directly liable under negligent hiring, retention, or supervision theories. This special verdict form applies in cases where there is a claim against the employer for negligent hiring or retention. Separate questions on those theories, along with the causation question, must be included in that case, and the comparative fault question would have to include the employer's fault if the employer is found to have negligently hired or retained the employee who injures the plaintiff.

The special verdict questions and their supporting jury instructions are as follows:

1. CIVJIG 25.10: Negligence
2. CIVJIG 27.10: Direct Cause
3. CIVJIG 30.15: Scope of Responsibility
4. CIVJIG 55.20: Negligent Hiring

   CIVJIG 55.30: Negligent Retention

5. CIVJIG 27.10: Direct Cause
6. CIVJIG 25.10: Negligence
7. CIVJIG 27.10: Direct Cause
8. CIVJIG 28.15: Comparative Fault

AUTHORITIES

An employer is vicariously liable for the negligent acts of an employee who is acting in the course and scope of his or employment. *E.g., Edgewater Motels, Inc. v. Gatzke*, 277 N.W.2d 11, 15 (Minn. 1979); *Ismil v. L.H. Sowles Co.*, 295 Minn. 120, 123, 203 N.W.2d 354, 357 (1972); *Porter v. Grennan Bakeries, Inc.*, 219 Minn. 14, 21–22, 16 N.W.2d 906, 909–10 (1944). An employer may also be directly liable for negligent hiring, retention, or supervision. *E.g., Ponticas v. K.M.S. Investments, Inc.*, 331 N.W.2d 907, 911 n.5 (Minn. 1983). Negligent supervision claims require proof that the employee was acting in the course and scope of his or her authority. *E.g., L.M. v. Karlson*, 646 N.W.2d 537, 545 (Minn. Ct. App. 2002), rev. denied (Minn. Aug. 20, 2002); *Oslin v. State*, 543 N.W.2d 408, 414–15 (Minn. Ct. App. 1996), rev. denied (Minn. Apr. 1, 1996); *Yunker v. Honeywell, Inc.*, 496 N.W.2d 419, 422 (Minn. Ct. App. 1993), rev. denied (Minn. Apr. 20, 1993).

CIVSVF 30.92

VICARIOUS LIABILITY—SCOPE OF EMPLOYMENT; INTENTIONAL TORT AND NEGLIGENT HIRING OR RETENTION

1. Did (defendant) commit a battery on (plaintiff)?

____
Yes or No

2. *If your answer to Question 1 was "Yes," then answer this question*: Was this battery by (defendant) a direct cause of (plaintiff's) injuries?

____
Yes or No

3. Was (defendant) acting in the scope of (his) (her) authority for (defendant employer) at the time of the battery?

____
Yes or No

4. Was (defendant employer) negligent in (hiring) (retaining) (defendant employee)?

____
Yes or No

5. *If your answer to Question 4 was "Yes," then answer this question:* Was (employer's) negligence a direct cause of (plaintiff's) accident?

____
Yes or No

6. Was (plaintiff) negligent?

____
Yes or No

7. *If your answer to Question 6 was "Yes," then answer this question:* Was (plaintiff's) negligence a direct cause of the accident?

____
Yes or No

[If your answers to questions 5 and 7 were "Yes," then answer Question 8.]

8. Taking all of the negligence that contributed as a direct cause of the accident to be 100%, what percentage do you attribute to:

(defendant employer) ________%

(plaintiff) ________%

TOTAL 100%

USE NOTE

In cases where vicarious liability is in issue, the special verdict form must include a separate question that asks whether the employee was acting in the course and scope of his or her authority. If the employee committed an intentional tort and acted and in the scope of his or her authority at the time, the employee's fault would be imputed to the employer. In addition to being vicariously liable, the employer may also be directly liable under negligent hiring, retention, or supervision theories. This special verdict form applies in cases where there is a claim against the employer for negligent hiring or retention in addition to an intentional tort claim for battery against an employee. In this case, intentional misconduct would not be compared against the plaintiff's negligence, if any, but the plaintiff's negligence would be subject to comparison against the employer's fault in negligently hiring or retaining the employee who committed the battery.

The special verdict questions and their supporting jury instructions are as follows:

1. CIVJIG 60.25: Battery
2. CIVJIG 27.10: Direct Cause
3. CIVJIG 30.15: Scope of Responsibility

   CIVJIG 30.20—Employee—Issue as to Scope of Authority—Intentional Wrong
4. CIVJIG 55.20: Negligent Hiring:

   CIVJIG 55.30: Negligent Retention
5. CIVJIG 27.10: Direct Cause

6. CIVJIG 25.10: Negligence
7. CIVJIG 27.10: Direct Cause
8. CIVJIG 28.15: Comparative Fault

AUTHORITIES

An employer is vicariously liable for the intentional torts of an employee who is acting in the course and scope of his or employment. *E.g., Fahrendorff v. North Homes, Inc.*, 597 N.W.2d 905, 912 (Minn. 1999). An employer may also be directly liable for negligent hiring, retention, or supervision. *E.g., Ponticas v. K.M.S. Investments, Inc.*, 331 N.W.2d 907, 911 n.5 (Minn. 1983). Negligent supervision claims require proof that the employee was acting in the course and scope of his or her authority. *E.g., L.M. v. Karlson*, 646 N.W.2d 537, 545 (Minn. Ct. App. 2002), rev. denied (Minn. Aug. 20, 2002); *Oslin v. State*, 543 N.W.2d 408, 414–15 (Minn. Ct. App. 1996), rev. denied (Minn. Apr. 1, 1996); *Yunker v. Honeywell, Inc.*, 496 N.W.2d 419, 422 (Minn. Ct. App. 1993), rev. denied (Minn. Apr. 20, 1993).

Contributory negligence is not a defense to an intentional tort. *Florenzano v. Olson*, 387 N.W.2d 168, 175 (Minn. 1986). The contributory negligence of a plaintiff may, however, be subject to comparison in a negligent hiring or retention case.

CATEGORY 32

IMPUTED FAULT—MOTOR VEHICLE

Table of Instructions

CIVJIG 32.10 Ownership of Motor Vehicle
CIVJIG 32.15 Motor Vehicle Owner—Statutory Imputation of Liability—Consent—Adult
CIVJIG 32.16 Motor Vehicle Owner—Statutory Imputation of Liability—Revocation of Consent—Adult
CIVJIG 32.20 Motor Vehicle Owner—Statutory Imputation of Liability—Consent—Adult Deviation
CIVJIG 32.25 Motor Vehicle Owner—Statutory Imputation of Liability—Consent—Child

SPECIAL VERDICT FORMS

CIVSVF 32.90 Permission to Use a Motor Vehicle

INTRODUCTORY NOTE

See Category 30, Introductory Note.

CIVJIG 32.10

OWNERSHIP OF MOTOR VEHICLE

Ownership of the vehicle

In deciding who owns a motor vehicle you may consider:

1. The name on the certificate of title
2. Whether the vehicle was delivered
3. The circumstances of the purchase
4. Who paid how much of the purchase price
5. The name on the purchase invoice
6. Who paid the insurance
7. The name of the person insured by the policy
8. Who provided the upkeep and repair
9. Who controlled and operated or used the vehicle.

USE NOTE

This instruction is intended for use in cases where the issue of ownership is not resolvable as a matter of law. The instruction should not be used in cases where there is compliance with the transfer of title provisions of the Motor Vehicle Act. It should only be used in cases where there is noncompliance.

AUTHORITIES

"Owner" is defined in M.S.A. § 65B.43, subd. 4, as follows:

> "Owner" means a person, other than a lienholder or secured party, who owns or holds legal title to a motor vehicle or is entitled to the use and possession of a motor vehicle subject to a security interest held by another person. If a motor vehicle is the subject of a lease having an initial term of six months or longer, the lessee shall be deemed the owner for the purposes of sections 65B.41 to 65B.71, and 169.09, subdivision 5a, notwithstanding the fact that the lessor

> retains title to the vehicle and notwithstanding the fact that the lessee may be the owner for the purpose of chapter 168A.

M.S.A. § 168A.05, subd. 6, states that "A certificate of title issued by the department is prima facie evidence of the facts appearing on it." The supreme court has held that the presumption of ownership that is created when a party's name appears on the certificate of title may be rebutted. *Vue v. State Farm Ins. Cos.*, 582 N.W.2d 264, 266 (Minn. 1998); *Arneson v. Integrity Mut. Ins. Co.*, 344 N.W.2d 617, 619 (Minn. 1984); *Welle v. Prozinski*, 258 N.W.2d 912, 916 (Minn. 1977); *BLC Ins. Co. v. Vivent*, 359 N.W.2d 315, 317 (Minn. Ct. App. 1984). Compliance with the title transfer requirements establishes a conclusive presumption that a sale has taken place, but noncompliance with the provisions of M.S.A. § 168A.10 does not preclude the titleholder from introducing extrinsic evidence that tends to establish that a sale has in fact occurred, even though there was noncompliance with the title transfer provisions of M.S.A. § 168A.10. *See Arneson*, 344 N.W.2d at 619. The rule applies both for purposes of determining vicarious liability under M.S.A. § 169.09, subd. 5a, and for determining who has the obligation to provide the compulsory insurance under M.S.A. § 65B.48. *Arneson*, 344 N.W.2d at 619.

In *American Nat'l General Ins. Co. v. Solum*, 641 N.W.2d 891 (Minn. 2002), the supreme court held that extrinsic evidence may not be introduced to rebut the presumption of ownership created by the issuance of title that complies with the provisions of the Motor Vehicle Certificate of Title Act. The use of extrinsic evidence rebutting title transfer is limited to cases where "a transferor who had not complied with the transfer provisions of the Motor Vehicle Act was attempting to avoid vicarious liability based upon the 'true facts.' " *American Nat'l General Ins. Co. v. Solum*, 641 N.W.2d at 897. In elaborating, the court said:

> [T]he Motor Vehicle Act was intended to provide a single filing system of vehicle registration on which all parties could rely for determining who was the owner of a motor vehicle, similar to the Torrens system for the registration of title to real estate . . . . Thus, the presumption of ownership established by the certificate of title, that 30 years ago was generally rebuttable, became for the most part conclusive.
>
> The ability to rebut ownership of the vehicle was "greatly circumscribed," available only to prove the identity of the *true* owner in cases where the seller-transferor failed to comply with the transfer requirements of the act and sought to avoid liability under the Safety Responsibility Act or determine rights and responsibilities relating to uninsured motorist coverage.

American Nat'l General Ins. Co. v. Solum, 641 N.W.2d at 899 (emphasis the court's; citations omitted).

In *Auto-Owners v. Forstrom*, 684 N.W.2d 494 (Minn. 2004), the supreme court noted that the Solum rule applies to permit the use of extrinsic evidence of ownership where there is noncompliance, "*and* either an effort to determine rights and responsibilities relating to uninsured motorist coverage *or* a seller's attempt to avoid liability under the Safety Responsibility Act." *Auto-Owners v. Forstrom*, 684 N.W.2d at 498 (emphasis the court's).

Research References

West's Key Number Digest
Automobiles ⚷19, 20, 31, 186, 246(17)

Legal Encyclopedias
C.J.S., Motor Vehicles §§ 69 to 104, 164 to 170, 832, 835, 863, 1257, 1296, 1300

CIVJIG 32.15

MOTOR VEHICLE OWNER—STATUTORY IMPUTATION OF LIABILITY—CONSENT—ADULT

Consent to the initial use of the vehicle

You must decide whether (owner) gave permission to (driver) for the initial use of the vehicle. You must consider all the circumstances, including:

1. Any discussions about the driver's permission to use the vehicle
2. The relationship between the owner and the driver
3. The fact that the driver used the vehicle, or frequently used the vehicle in the past
4. Whether the owner objected to the driver using the vehicle in the past, or using it in the future
5. [Additional factors].

Once an owner gives initial permission to a driver to use a vehicle, any later use by that driver remains permitted even though the owner did not agree to the use and the driver goes beyond the scope of the initial grant of permission.

USE NOTE

In a case involving consent for a minor to drive, the consent issue should not be submitted to the jury absent a strong showing made by the party challenging consent. If there is a question concerning revocation of permission, CIVJIG 43.16 should be given after this instruction.

This instruction is intended for use in cases in which there is a dispute whether the owner gave initial permission for use of the vehicle. For cases in which there is a question about revocation of permission, use CIVJIG 32.16.

AUTHORITIES

M.S.A. § 169.09, subd. 5a, provides that "[w]henever any motor vehicle shall be operated within this state, by any person other than the owner, with the consent of the owner, express or implied, the operator thereof shall in case of accident, be deemed the agent of the owner of such motor vehicle in the operation thereof."

The purpose of this statute is to make owners of motor vehicles liable to persons injured by operation of the vehicle where liability would not otherwise exist. *See Milbank Mut. Ins. Co. v. United States Fidelity & Guaranty Co.*, 332 N.W.2d 160, 165 (Minn. 1983); *Holmes v. Lilygren Motor Co.*, 201 Minn. 44, 48, 275 N.W. 416, 418 (1937). The statute is aimed at imposing liability on those who are owners and have the power and right to prevent the use of the vehicle. *See Frye v. Anderson*, 248 Minn. 478, 492, 80 N.W.2d 593, 602 (1957).

Under the statute, elements that must be established include: (1) that the alleged owner was in fact the owner, as that term is interpreted under the statute, (2) that use of the motor vehicle was with the express or implied consent of the owner, and (3) that the driver's negligent operation or use of the vehicle caused the damage complained of. *See Frye v. Anderson*, 248 Minn. 478, 492, 80 N.W.2d 593, 602 (1957).

Proof of ownership may involve more than merely proof of registered title to the automobile. *See Frye v. Anderson*, 248 Minn. 478, 487–89, 80 N.W.2d 593, 602 (1957); *Flaugh v. Egan Chevrolet*, 202 Minn. 615, 617, 279 N.W. 582, 584 (1938). Evidence is admissible to show that title is different from that appearing on the registration. *See Arneson v. Integrity Mut. Ins. Co.*, 344 N.W.2d 617, 619 (Minn. 1984); *Welle v. Prozinski*, 258 N.W.2d 912, 916 (Minn. 1977).

Proof of ownership of the automobile establishes a prima facie case that it is being operated upon a public highway with express or implied consent of the owner at the time of the accident. *Carey v. Broadway Motors, Inc.*, 253 Minn. 333, 337, 91 N.W.2d 753, 756 (1958). The statutory inference of permission to operate the vehicle does not relieve the claimant of the burden of proving that the vehicle was being used with the permission of the owner at the time and place of the accident. *See Newcomb v. Meiss*, 263 Minn. 315, 325–26, 116 N.W.2d 593, 600 (1962).

Consent must be determined like any other fact. *See Koski v. Muccilli*, 201 Minn. 549, 551, 277 N.W. 229, 230 (1938). Implied consent of the owner of a vehicle to its operation by another may be drawn from all facts and circumstances of the case. *Beebe v. Kleidon*, 242 Minn. 521, 525, 65 N.W.2d 614, 616 (1954). Previous use of a car with express consent cannot be construed as evidence of implied consent at a subsequent time. *See Kayser v. Jungbauer*, 217 Minn. 140, 143–144, 14 N.W.2d 337, 339 (1944).

A provision in a written agreement between a garage and one to whom it loans an automobile prohibiting use by another is ineffective unless the borrower is aware of the prohibition. *See Taylor v. Allstate Ins. Co.*, 286 Minn. 449, 455, 176 N.W.2d 266, 270 (1970).

Research References

West's Key Number Digest
Automobiles ⚷192 to 195(6), 246(15)

Legal Encyclopedias
C.J.S., Motor Vehicles §§ 665 to 666, 832, 835 to 859, 864 to 868, 874, 876 to 877, 879, 1257, 1275, 1296, 1300

CIVJIG 32.16

MOTOR VEHICLE OWNER—STATUTORY IMPUTATION OF LIABILITY—REVOCATION OF CONSENT—ADULT

Withdrawal of permission

> If you find that (owner) withdrew (driver's) permission to use the vehicle at a time when the vehicle was not in (owner's) possession, and (owner) expects there will be additional driving of the vehicle by (driver), withdrawal of permission is complete upon the return of the vehicle to (owner).

USE NOTE

This instruction is intended for use in cases where the motor vehicle owner revokes the driver's permission to use the vehicle. That revocation may contemplate additional use by the driver as, for example, the driving necessary to return the vehicle to the owner.

AUTHORITIES

M.S.A. § 169.09, subd. 5a, provides that "[w]henever any motor vehicle shall be operated within this state, by any person other than the owner, with the consent of the owner, express or implied, the operator thereof shall in case of accident, be deemed the agent of the owner of such motor vehicle in the operation thereof."

The purpose of this statute is to make owners of motor vehicles liable to persons injured by operation of the vehicle where liability would not otherwise exist. *See Milbank Mut. Ins. Co. v. United States Fidelity & Guaranty Co.*, 332 N.W.2d 160, 165 (Minn. 1983); *Holmes v. Lilygren Motor Co.*, 201 Minn. 44, 48, 275 N.W. 416, 418 (1937). The statute is aimed at imposing liability on those who are owners and have the power and right to prevent the use of the vehicle. *See Frye v. Anderson*, 248 Minn. 478, 492, 80 N.W.2d 593, 602 (1957).

Under the statute, elements that must be established include: (1) that the alleged owner was in fact the owner, as that term is interpreted under the statute, (2) that use of the motor vehicle was with the express or implied consent of the owner, and (3) that the driver's negligent operation or use of the vehicle caused the damage complained of. *See Frye v. Anderson*, 248 Minn. 478, 492, 80 N.W.2d 593, 602 (1957).

An owner's demand that a vehicle be returned does not alone terminate initial permission to use the vehicle. "Instead, when a request for the return of a car contemplates additional driving, the initial permission is extended to allow the permittee to return the car." *Bates v. Armstrong*, 603 N.W.2d 679 (Minn. Ct. App. 2000).

CIVJIG 32.20

MOTOR VEHICLE OWNER—STATUTORY IMPUTATION OF LIABILITY—CONSENT—ADULT DEVIATION

"Converted" or stolen vehicles

If (driver) had (owner's) initial permission to use the vehicle, you must decide if (driver) converted or stole the vehicle.

A vehicle is not converted or stolen just because (driver) deviated from the scope of the permission given by (owner).

Definition of converted

The vehicle was "converted" if (driver):

1. Intentionally exercised control of the vehicle in a way that was contrary to (owner)'s right to the vehicle, or

2. Intentionally deprived (owner) of the vehicle's possession permanently, or for an indefinite period of time.

[The accidental destruction of a motor vehicle is not conversion.]

Definition of stolen

The vehicle was "stolen" if (driver):

1. Intentionally took (owner)'s vehicle, and

2. Knew or believed that (he) (she) had no right to the vehicle, and

3. Intended or believed that (owner)'s loss would be permanent.

USE NOTE

If the owner of a motor vehicle gives initial permission to another to use the vehicle, only conversion or theft will relieve the owner's insurer from liability. This instruction is intended for use in cases where those questions are in issue. Use CIVJIG 60.10 for a definition of "intentional."

AUTHORITIES

In *Milbank Mutual Ins. Co. v. United States Fidelity & Guar. Co.*, 332 N.W.2d 160 (Minn. 1983), the supreme court abandoned the "minor deviation rule" in favor of the "initial permission" rule. Under the initial permission rule, if there is initial consent to the use of the motor vehicle, "any violation of a limited scope of permission by the operator, short of theft or conversion of the vehicle, will not relieve the insurer from affording to the named insured coverage protecting him against claims made against him by an injured third party." *Milbank Mutual Ins. Co. v. United States Fidelity & Guar. Co.*, 332 N.W.2d at 167.

A conversion exists where there is an exercise of control over property that is inconsistent with the owner's right of possession, or that deprives the owner of possession permanently or for an indefinite period of time. *See Inland Constr. Corp. v. Continental Casualty Co.*, 258 N.W.2d 881, 884 (Minn. 1977); *Hildegarde, Inc. v. Wright*, 244 Minn. 410, 413, 70 N.W.2d 257, 259 (1955). The definition of "theft" in the jury instruction is based primarily on CRIMJIG 16.02.

In *Christensen v. Milbank Ins. Co.*, 658 N.W.2d 580 (Minn. 2003), a drivers' education instructor who had permission to park the school district's van at his home, but did not have permission to use the van for personal use, took it for a drive after drinking some beers, and then drank some more, after which he was involved in a collision that totaled the van. He brought a declaratory judgment action to determine whether the school district's insurance plan or Christensen's own automobile liability insurer was the primary insurer. The supreme court held that a wrongful intent to appropriate chattel for one's own purposes is the essence of the "conversion or theft" exception to the initial permission rule. *Christensen*, 658 N.W.2d at 586. While conversion does not require an intentional destruction of property, the intentional dominion or control necessary for conversion cannot be shown by accidental destruction of the vehicle in a collision. In *Christensen*, the majority therefore held that because there is no other basis for a finding of the requisite wrongful intent, the plaintiff did not convert the van. Chief Justice Blatz, concurring in part and dissenting in part, wrote, "[i]t is this choice to drink excessively and use another's property—not the destruction of the property—that constitutes the requisite wrongful intent necessary for conversion." In Chief Justice Blatz's view, the majority decision redefines conversion to mean theft and, thus, "effectively eliminates the exception of conversion from the initial permission rule." *Christensen*, 658 N.W.2d at 588.

In *Bates v. Armstrong*, 603 N.W.2d 679 (Minn. Ct. App. 2000), rev. denied (March 14, 2000), the issue was whether, absent theft or conversion, a later demand by an owner for return of a vehicle is sufficient to terminate the initial permission to use the vehicle and avoid vicarious liability under M.S.A. § 170.54 (now 169.09, subd. 5a), the Safety Responsibility Act. The court held that it was not:

> Conversion may be established by proof of some act that changes the character of the property or permanently deprives the owner of it . . . . Although a refusal to deliver property upon demand is evidence of conversion, proof of conversion must also demonstrate repudiation of ownership rights by the possessor . . . . Because the measure of damages in conversion actions is the full value of the chattel at the time of the tort, conversion is "properly limited . . . to those serious, major, and important interferences with the right to control the chattel which justify requiring the defendant to pay its full value." Restatement (Second) of Torts § 222A cmt. c (1965) . . . .
>
> An owner's demand for the return of a motor vehicle alone does not effectively terminate the permission initially granted for its use. Instead, when a request for the return of a car contemplates additional driving, the initial permission is extended to allow the permittee to return the car. *Cf. State Farm Mut. Auto. Ins. Co. v. Estate of Simmons*, 169 N.J.Super. 133, 404 A.2d 349, 352 (1979) (initial permission revoked when owner demanded that permittee return car keys, permittee refused, permittee's companion threatened owner with violence, and return of the car did not involve additional driving), aff'd, 84 N.J. 28, 417 A.2d 488 (1980). Absent theft or conversion, once an owner entrusts a motor vehicle to another, a demand for the return of the vehicle that contemplates additional driving does not render subsequent use of the vehicle nonpermissive, and the risk of liability for the negligent use of the vehicle remains with the owner until the vehicle is returned to him or her . . . .
>
> Our holding is consistent with the legislature's clearly stated policy of assuring innocent persons injured by the negligent use of a vehicle an "approximate certainty" of recovery. A contrary holding would foster troublesome and possibly collusive litigation on the circumstances surrounding the owner's demand and thereby obstruct the achievement of legislative policy. It would also run contrary to the legislature's desire to hold owners responsible for the negligence of those to whom they entrust their vehicles.

603 N.W.2d at 682–83 (citations omitted).

Research References

West's Key Number Digest
Automobiles ⚷192 to 195(6), 246(15)

Legal Encyclopedias
C.J.S., Motor Vehicles §§ 665 to 666, 832, 835 to 859, 864 to 868, 874, 876 to 877, 879, 1257, 1275, 1296, 1300

CIVJIG 32.25

MOTOR VEHICLE OWNER—STATUTORY IMPUTATION OF LIABILITY—CONSENT—CHILD

Use of the vehicle by a minor

(Name of vehicle owner) denies that the vehicle was being driven with (his) (her) permission.

A parent's vehicle is used without the parent's permission if:

1. The parent took every reasonable precaution to prevent his or her child from using the vehicle, and
2. The vehicle was taken without the parent's knowledge and consent.

USE NOTE

This instruction is intended for use in cases where the issue is whether a parent gave initial permission to a minor to use their motor vehicle. Once initial permission is given, vicarious liability will typically follow.

AUTHORITIES

In *Jones v. Fleischhacker*, 325 N.W.2d 633, 637 (Minn. 1982), the supreme court held that if initial use of a motor vehicle by a minor is with the parent's knowledge, vicarious liability of the parents follows, absent proof of theft or conversion, notwithstanding explicit instructions to the contrary. If there is a dispute as to whether initial permission was given, the court said that there will be no liability if the owner took every reasonable precaution to prevent access to the vehicle by the minor, or if the vehicle was taken by the minor without the parent's knowledge or consent. *See Jones*, 325 N.W.2d at 637.

If a person permits a minor member of his family to use his automobile, he is deemed to have given consent to the operation of his automobile by any third person driving with the minor's consent, notwithstanding any oral prohibitions as to who may drive or as to the use of the automobile. *See Jones*, 325 N.W.2d at 637 (Minn. 1982); *Hutchings v. Bourdages*, 291 Minn. 211, 213, 189 N.W.2d 706, 708 (1971).

Research References

West's Key Number Digest
Automobiles 🔑188, 191, 195, 246(15)

Legal Encyclopedias
C.J.S., Infants § 283; Motor Vehicles §§ 832, 838 to 839, 841 to 846, 873, 1257, 1275, 1300

SPECIAL VERDICT FORMS

CIVSVF 32.90

PERMISSION TO USE A MOTOR VEHICLE

1. Did (name of person) have (motor vehicle owner's) permission to drive (her) (his) motor vehicle at the time of the (date) accident?

2. Had (name of person) (converted) (stolen) (name of motor vehicle owner's) at the time of the (date) accident?

USE NOTE

This special verdict form is intended for use in cases where the issue of whether a driver of a motor vehicle had the owner's permission to use the vehicle at the time of the accident. There may be fact issues as to whether the driver had the owner's initial permission to use the vehicle at the time of the accident, including whether that permission was revoked. Those issues should be resolved in a single question asking whether the motor vehicle user had permission to use the vehicle at the time of the accident. That question may be dispositive, but if there is a question as to whether the vehicle had been converted or stolen at the time of the accident, the second question should be asked.

The special verdict questions and their supporting jury instructions are as follows:

1. CIVJIG 30.15: Motor Vehicle Owner—Statutory Imputation of Liability—Consent—Adult

   CIVJIG: 30.16: Motor Vehicle Owner—Statutory Imputation of Liability—Revocation of Consent—Adult

2. CIVJIG 32.20: Motor Vehicle Owner—Statutory Imputation of Liability—Consent—Adult Deviation

PART III

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CATEGORY 38

ANIMAL LAW—INURIES CAUSED BY ANIMALS

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INTRODUCTORY NOTE

In Minnesota there are three primary theories of recovery that may apply to cases involving injuries caused by animals. Two of the theories, common law strict liability ("scienter") and negligence, are common law claims. The third is a statutory action under M.S.A. § 347.22, which applies only to claims for physical harms caused by dogs.

There are also two statutory actions providing for damages caused by trespassing animals. M.S.A. § 346.16 imposes liability for damages caused by certain specified types of animals running at large. M.S.A. § 561.09 imposes liability for damages caused by certain animals or fowls running at large or trespassing.

Scienter Action

The Minnesota Supreme Court recognized the scienter action in *Fake v. Addicks*, 45 Minn. 37, 47 N.W.2d 450 (1890). The court held that once an owner is on notice that the owner's animal has exhibited a vicious nature, the owner is liable harm caused by the animal if the owner elects to keep the animal. The theory applies only to owners of domesticated animals. *See Clark v. Brings*, 287 Minn. 73, 75, 169 N.W.2d 407, 409 (1969). The plaintiff has the burden of proving the viciousness of an animal.

In *Fake* the supreme court stated that:

> The gravamen of the action is the neglect of the owner of an animal known by him to be vicious and liable to attack and injure people, to restrain him so as to prevent the risk of damage; and the notice of such propensity must be such as to put a prudent man on his guard.

Fake, 45 Minn. at 39, 47 N.W. at 451. In *Lee v. Seekins*, 208 Minn. 546, 548, 294 N.W. 842, 844 (1940), the supreme court stated that "[t]he gist of an action of this kind is the neglect of the owner or keeper of the animal, known to be vicious and liable to attack, to restrain it," that "notice of viciousness, actual or constructive, must be such to put a prudent man on guard," and that "[n]egligence is presumed where an injury follows the keeping of an animal known to be vicious."

A reasonable person standard applies in determining whether an owner should have been put on notice of the animal's vicious nature. *See Anderson v. Anderson*, 259 Minn. 412, 415, 107 N.W.2d 647, 649 (1961).

In *Ryman v. Alt*, 266 N.W.2d 504, 506 (Minn. 1978), the court summarized the elements:

> [A] person injured by a domestic animal such as a dog may recover from the animal's keeper for injuries inflicted by the animal only by proving that (1) the animal had a vicious propensity, and (2) the animal's keeper had notice of the vicious propensity.
>
> The scienter action is not based on negligence; once the animal's dangerousness and the keeper's scienter are proved, liability follows unless the person injured voluntarily and knowingly assumed the risk of injury.

Minnesota's law is consistent with the Restatement (Third) of Torts § 23 (2010), which covers abnormally dangerous animals:

> An owner or possessor of an animal that the owner or possessor knows or has reason to know has dangerous tendencies abnormal for the animal's category is subject to strict liability for physical harm caused by the animal if the harm ensues from that dangerous tendency.

Dog Injury Statute

M.S.A. § 347.22 reads as follows:

> If a dog, without provocation, attacks or injures any person who is

> acting peaceably in any place where the person may lawfully be, the owner of the dog is liable in damages to the person so attacked or injured to the full amount of the injury sustained. The term "owner" includes any person harboring or keeping a dog but the owner shall be primarily liable. The term "dog" includes both male and female of the canine species.

The supreme court has characterized the statute as providing for "absolute statutory strict liability," a doctrine that applies "when the legislature, by enacting a particular statute, intends to preclude certain defenses and place the entire responsibility for the injury upon the individual who violated the statute." *Seim v. Garavalia*, 306 N.W.2d 806, 811 (Minn. 1981); *see also Anderson v. Christopherson*, 816 N.W.2d 626, 630 (Minn. 2012); *Engquist v. Loyas*, 803 N.W.2d 400, 405 (Minn. 2011); *Lewellin ex rel. Lewellin v. Huber*, 465 N.W.2d 62, 64 (Minn. 1991).

Liability under the statute is subject only to the "defenses of provocation and failure of the injured person to conduct himself peacefully while in a lawful place." *Id.* Contributory negligence is not a defense to a statutory violation. *Seim*, 306 N.W.2d at 811.

There are three key recurring issues in cases involving the application of the statute. One concerns the meaning of "provocation." The second concerns the standards for determining the necessary causal link between the dog's actions and the plaintiff's in juries. The third concerns the definitions of owning and harboring.

The supreme court established the standard for provocation in *Engquist v. Loyas*, 803 N.W.2d 400, 406 (Minn. 2011):

> Specifically, a plaintiff-victim who voluntarily and unnecessarily provokes a dog in a manner that invites a dog attack is not entitled to recover. *It is not necessary that the plaintiff-victim intend to provoke the dog.* Rather, *provocation involves voluntary conduct that exposes the person to a risk of harm from the dog, where the person had knowledge of the risk at the time of the incident.* The question of whether a dog was provoked within the meaning of the statute in a given case is primarily a question of fact for the jury.

Id. at 406 (emphasis supplied).

Provocation need not be intentional. Provocation does require voluntary conduct that exposes the plaintiff-victim to a risk of harm of which the plaintiff-victim had knowledge at the time of the incident. The elements of the defense are quite similar to primary assumption of risk. *E.g.*, *Daly v. McFarland*, 812 N.W.2d 113 (Minn. 2012). The defense of provocation as framed by the supreme court appears to focus on voluntary conduct by the plaintiff exposing her to harm and knowledge of the risk of harm presented by the dog.

In *Anderson v. Christopherson*, 816 N.W.2d 626, 631 (Minn. 2012), quoting *Lewellin ex rel. Lewellin v. Huber*, 465 N.W.2d 62, 64 (Minn. 1991), the supreme court stated that "[i]n order to be subject to the statute, 'legal causation for absolute liability under the statute must be direct and immediate, i.e., without intermediate linkage.' " While there will ordinarily be no issue concerning causation, the "direct and immediate" standard is a proximate cause standard intended for use by the trier of fact where proximate cause, or the scope of liability, is a fact issue for the jury.

Negligence

Negligence is frequently asserted in cases involving injuries caused by domesticated animals. *See, e.g., Clark v. Brings*, 284 Minn. 73, 169 N.W.2d 407 (1969) (alleged negligence in failing to provide babysitter with safe place to work because of injuries caused by cat); *Rosenthal v. Hill Top Riding Academy, Inc.*, 261 Minn. 88, 110 N.W.2d 854 (1961) (alleged negligence in permitting an inexperienced 17-year-old to ride horse at edge of suburban road near dark); *Harris v. Breezy Point Lodge, Inc.*, 238 Minn. 322, 56 N.W.2d 655 (1953) (alleged negligence in permitting inexperienced rider on horse with propensity to balk and rear up or negligence by defendant's stable manager and rider in causing the horse to do so); *Macho v. Mahowald*, 374 N.W.2d 312 (Minn. Ct. App. 1985) (negligence in allowing rider on horse without proper saddle adjustment), *rev. denied* (Minn. Nov. 4, 1985); *Boitz v. Preblich*, 405 N.W.2d 907 (Minn. Ct. App. 1987) (plaintiff alleged negligence in addition to scienter and statutory actions in a case where a dog bumped into him and knocked him down). The basic elements of negligence in cases involving injuries caused by animals are the same as in any other negligence case. *See Boitz v. Preblich*, 405 N.W.2d 907 (Minn. Ct. App. 1987).

Negligence claims may be asserted in addition to other theories. In *Ryman v. Alt*, 266 N.W.2d 504 (Minn. 1978), the supreme court noted that it has never held that the scienter action is the exclusive basis for recovery for injuries caused by domestic animals. The court has also noted that in cases involving injuries caused by dogs, the dog injury statute is not the only theory of liability that an injured person may assert. *See Lewellin ex rel. Lewellin v. Huber*, 465 N.W.2d 62, 65 (Minn. 1991).

Special Verdict Forms—Multiple Theories

Putting together jury instructions and special verdict forms in cases involving multiple theories or multiple parties subject to liability under different theories is challenging. The difficulty is that there are differences in the elements of the causes of action under the three theories, as well as potentially differing causation standards and defenses. There are four special verdict forms in this part that navigate those inconsistencies. The first, CIVSVF 38.90, deals with a claim based on a violation of M.S.A. § 347.22. The second, CIVSVF 38.91, assumes a claim against the owner or harborer of a dog based on negligence and a violation of M.S.A. § 347.22. The third, CIVSVF 38.92, involves two defendants, one of whom is not a dog owner or harborer or keeper. It assumes that both negligence and statutory strict liability theories are asserted against the dog owner or harborer or keeper. The fourth, CIVSVF 38.93, assumes claims for common strict liability and negligence asserted against the owner of an animal.

CIVJIG 38.10

SCIENTER ACTION—DOMESTIC ANIMALS

Liability of Owner or Keeper

The (owner) (keeper) of a domestic animal is liable for injuries caused by an animal if

1. The animal had a vicious or dangerous propensity, and

2. The (owner) (keeper) had notice of that vicious or dangerous propensity.

Propensity

Propensity means having a tendency to behave in a particular way.

USE NOTE

This instruction covers common law strict liability claims. It applies in cases where a domestic animal causes injury to a person. It differs from a statutory strict liability claim under M.S.A. § 347.22 because the statutory action does not require proof of either a vicious or dangerous propensity, or a knowledge of that propensity.

The instruction includes a requirement of proof of a "vicious or dangerous" propensity. The Committee recommends use of either vicious or dangerous, depending on the case.

AUTHORITIES

The Minnesota Supreme Court recognized the scienter action in *Fake v. Addicks*, 45 Minn. 37, 47 N.W.2d 450 (1890). The court held that once an owner is on notice that the animal has exhibited a vicious nature, the owner is liable for harm caused by the animal if the owner elects to keep the animal. The theory applies only to owners of domesticated animals. *See Clark v. Brings*, 287 Minn. 73, 75, 169 N.W.2d 407, 409 (1969).

In *Lee v. Seekins*, 208 Minn. 546, 548, 294 N.W. 842, 844 (1940), the supreme court stated that "[t]he gist of an action of this kind is the neglect of the owner or keeper of the animal, known to be vicious and liable to attack," to restrain it, that "notice of viciousness, actual or constructive, must be such to put a prudent man on guard," and that "[n]egligence is presumed where an injury follows the keeping of an animal known to be vicious."

In *Ryman v. Alt*, 266 N.W.2d 504, 506 (Minn. 1978) the Minnesota Supreme Court summarized the elements of a scienter action:

> [A] person injured by a domestic animal such as a dog may recover from the animal's keeper for injuries inflicted by the animal only by proving that (1) the animal had a vicious propensity, and (2) the animal's keeper had notice of the vicious propensity.

A plaintiff may assert a negligence theory in addition to the scienter theory. If the plaintiff proves negligence on the part of the defendant, recovery will be allowed without the need to prove viciousness of the dog and notice of that propensity. Conversely, the plaintiff may recover without proof of negligence upon a showing that the animal had a dangerous propensity known to the defendant. *Ryman v. Alt*, 266 N.W.2d 504, 508 (Minn. 1978). The court also stated that "any serious prior injury or behavior by the animal tending to cause harm can of itself be sufficient evidence of a vicious or dangerous propensity, whether manifested in play or in anger." *Id.* at 507.

The jury instruction in effect defines "propensity" as a "tendency." A standard dictionary definition of the term is "[a]n innate inclination" or "a tendency." The American Heritage College Dictionary (3d ed. 1997). Black's Law Dictionary (9th ed. 2009), defines "vicious propensity" as "[a]n animal's tendency to endanger the safety of persons or property."

CIVJIG 38.20

SCIENTER ACTION—DOMESTIC ANIMALS—DEFENSES

[Give CIVJIG 28.15 (Comparative Fault)]

USE NOTE

The pattern instruction on comparative fault may be given if the court determines that contributory negligence is an appropriate defense to a scienter action. The instruction will also be appropriate if the court determines that assumption of risk as it is expressed in the Minnesota Supreme Court's decisions is, in effect, secondary assumption of risk subject to comparison under the Minnesota Comparative Fault Act, M.S.A. § 604.01, subd. 1a. **Caveat:** the Committee takes no position on either issue, nor does the Committee take a position on the issue of whether primary assumption of risk applies in scienter actions.

AUTHORITIES

In *Anderson v. Anderson*, 259 Minn. 412, 107 N.W.2d 647 (1961), a case in which the plaintiff was injured by a bull, the defendant argued that the plaintiff should be barred from recovery because of his contributory negligence or assumption of risk. The court rejected contributory negligence as a defense, but held that a defense in the nature of assumption of risk would be a complete bar:

> While contributory negligence in the ordinary sense will not bar recovery where liability does not rest upon negligence, recovery is barred where the person injured voluntarily and unnecessarily places himself in the way of such animal. *Whether this bar to recovery be called assumption of risk or something else, it is at least closely akin to the ordinary conception of assumption of risk.*

Id. at 116, 107 N.W.2d at 649.

The court quoted the leading case, *Muller v. McKesson*, 73 N.Y. 195, 201 (1878), a New York Court of Appeals case in which the court said:

> If a person with full knowledge of the evil propensities of an animal wantonly excites him, or voluntarily and unnecessarily puts himself in the way of such an animal, he would be adjudged to have brought the injury upon himself, and ought not to be entitled to recover. In such a case it cannot be said, in a legal sense, that the keeping of the animal, which is the gravamen of the offense, produced the injury.

In *Ryman v. Alt*, 266 N.W.2d 504, 507 (Minn. 1978), the court stated that "[t]he scienter action is not based on negligence; once the animal's dangerousness and the keeper's scienter are proved, liability follows unless the person injured voluntarily and knowingly assumed the risk of injury."

Anderson was decided before the adoption of the comparative negligence statute and the 1978 amendments converting it to a Comparative Fault Act with a broad definition of the types of fault subject to comparison, including "strict liability." *See* M.S.A. § 604.01, subd. 1a ("'Fault'" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability."). *Ryman* was decided after the comparative negligence statute was adopted but before the adoption of the Comparative Fault Act amendments in 1978.

The court's opinion raises two issues. The first is whether contributory negligence should now be a defense to a strict liability claim, given the specific inclusion of "strict liability" in the definition of "fault" that is subject to comparison. Mere inclusion of "strict liability" does not mean that contributory negligence will automatically be a defense, however, as the supreme court noted in *Seim v. Garavalia*, 306 N.W.2d 806 (Minn. 1981). In other post-Comparative Fault Act cases, the supreme court has held that contributory negligence is not a defense if the defense is inconsistent with the defendant's common law duty of care to the plaintiff. *See Sandborg v. Blue Earth County*, 615 N.W.2d 61, 64–65 (Minn. 2000) (defense inconsistent with county's duty to prisoner who exhibited suicidal ideations); *Tomfohr v. Mayo Found.*, 450 N.W.2d 121, 125 (Minn.1990) (contributory negligence of patient who committed suicide while in a closed psychiatric ward inconsistent with hospital's duty to patient).

The second issue is whether the defense of "assumption of risk" is subject to comparison under the Comparative Fault Act or is a complete bar to recovery in a scienter action. If the conduct engaged in by the plaintiff in *Anderson* is viewed as secondary assumption of risk, it would be subject to comparison under the Comparative Fault Act.

Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 25 (2010), provides that "[i]f the plaintiff has been contributorily negligent in failing to take reasonable precautions, the plaintiff's recovery in a strict-liability claim under §§ 20–23 [including strict liability for abnormally dangerous animals] for physical or emotional harm is reduced in accordance with the share of comparative responsibility assigned to the plaintiff." Comment e explains the Restatement's treatment of assumption of risk:

> The Restatement Second of Torts, while generally rejecting contributory negligence as an affirmative defense, singled out one form of contributory negligence as a complete defense. Plaintiffs who know-

ingly and unreasonably subjected themselves to the risk of harm were barred from any recovery. The Second Restatement, while classifying such conduct under the heading of contributory negligence, appreciated that the conduct could also be understood from the perspective of the defense of assumption of risk. The Second Restatement, in a separate but related Section, declared that assumption of risk operates as a full defense against a strict-liability claim.

As far as the plaintiff's contributory negligence is concerned, this Section provides that all forms of contributory negligence are subject to the comparative-responsibility process. No separate defense of assumption of risk is recognized. Accordingly, under this Section particular plaintiffs whose recovery would have been barred under the Second Restatement can secure a partial, although generally small, recovery. However, certain cases that might have been covered by the assumption-of-risk defense in the Second Restatement are now subsumed under the scope-of-liability limitation on strict liability set forth in § 29.

CIVJIG 38.30

M.S.A. § 347.22

Duty of dog owner

Minnesota law states that:

> If a dog [without provocation], attacks or injures any person [who is acting peaceably in any place where the person may lawfully be] the owner of the dog is liable in damages to the person so attacked or injured to the full amount of the injury sustained.

USE NOTE

In *Engquist v. Loyas*, 803 N.W.2d 400, 407 (Minn. 2011), the supreme court stated that the jury should be "instructed that the dog owner's liability is absolute, subject to the statutory defense of provocation." This instruction accomplishes that in setting out the statutory standard for liability.

The Minnesota Supreme Court has noted that there are two defenses to an action under § 347.22. One is provocation and the other is where the plaintiff fails to conduct herself peaceably in a place where she had a lawful right to be. The supreme court has not construed the meaning of "peaceably" in § 347.22. The defenses are bracketed to emphasize that they should be the subject of an instruction only when they are in issue.

AUTHORITIES

The supreme court has characterized M.S.A. § 347.22 as providing for "absolute statutory strict liability," a doctrine that applies "when the legislature, by enacting a particular statute, intends to preclude certain defenses and place the entire responsibility for the injury upon the individual who violated the statute." *Seim v. Garavalia*, 306 N.W.2d 806, 811 (Minn. 1981); *see also Anderson v. Christopherson*, 816 N.W.2d 626, 630 (Minn. 2012); *Engquist v. Loyas*, 803 N.W.2d 400, 405 (Minn. 2011); *Lewellin ex rel. Lewellin v. Huber*, 465 N.W.2d 62, 64 (Minn. 1991).

Liability under the statute is subject only to the "defenses of provocation and failure of the injured person to conduct himself peacefully while in a lawful place." *Lewellin ex rel. Lewellin v. Huber*, 465 N.W.2d 62, 64 (Minn. 1991); *see also Seim v. Garavalia*, 306 N.W.2d 806, 812 (Minn. 1981).

In *Engquist v. Loyas*, 803 N.W.2d 400, 407 (Minn. 2011), the supreme court specified how a jury should be instructed in § 347.22 cases. The court stated that a jury should be instructed "that the dog owner's liability is absolute, subject to the statutory defense of provocation." *Id.*

CIVJIG 38.40

M.S.A. § 347.22—PROVOCATION

Provocation

A person provokes a dog when that person is aware of a risk of harm presented by a dog and voluntarily encounters that risk.

USE NOTE

Provocation is a complete bar to an action under M.S.A. § 347.22. If provocation is in issue, the provocation instruction should be given after the instructions covering liability under M.S.A. § 347.22.

AUTHORITIES

In *Engquist v. Loyas*, 803 N.W.2d 400, 406 (Minn. 2011), the court stated that the defense of "provocation focuses on the plaintiff-victim's conduct and requires both the plaintiff's direct knowledge of the danger and that the plaintiff-victim voluntarily exposed herself to that danger." Framed slightly differently, the court stated that "provocation involves voluntary conduct that exposes the person to a risk of harm from the dog, where the person had knowledge of the risk at the time of the incident." *Id.* at 407. The court also stated that "[t]he question of whether a dog was provoked within the meaning of the statute in a given case is primarily a question of fact for the jury." *Id.*

CIVJIG 38.50

M.S.A. § 347.22—ACTING PEACEABLY

[No recommended instruction]

USE NOTE

The Committee takes no position on the definition of "acting peaceably," given the lack of any definition of the term by the Minnesota appellate courts. Care has to be taken, however, in instructing the jury on this defense to avoid including conduct that is simply contributory negligence, which is not a defense to claims under M.S.A. § 347.22. *See Seim v. Garavalia*, 306 N.W.2d 806 (Minn. 1981).

AUTHORITIES

The Minnesota Supreme Court has noted that liability under M.S.A. § 347.22 is subject only to the "defenses of provocation and failure of the injured person to conduct himself peacefully while in a lawful place." *Lewellin ex rel. Lewellin v. Huber*, 465 N.W.2d 62, 64 (Minn. 1991); *see also Seim v. Garavalia*, 306 N.W.2d 806, 812 (Minn. 1981). The court has not construed the second defense.

CIVJIG 38.60

M.S.A. § 347.22—PROXIMATE CAUSE

Cause

A dog's (attack) (injury) must be a direct cause of (plaintiff's) injury.

USE NOTE

The supreme court has adopted the "direct and immediate, i.e., without intermediate linkage" standard for resolving contested proximate cause issues in § 347.22 actions. While the basic standard is "direct and immediate cause," the supreme court also added the phrase "without intermediate linkage" to the definition. It is unclear whether "without intermediate linkage" language is intended to be part of the standard, or only an explanation of the "direct and immediate cause" standard. The Committee is concerned that the use of the "without intermediate linkage" language is redundant and will not provide meaningful guidance for a jury asked to resolve a proximate cause issue.

The supreme court has adopted the "direct and immediate, i.e., without intermediate linkage" standard for resolving contested proximate cause or scope of liability issues in § 347.22 actions. While the basic standard in cases involving scope of liability issues is "direct and immediate cause," the supreme court added the phrase "without intermediate linkage" to the definition. It is unclear whether "without intermediate linkage" is intended to be part of the standard, or only an explanation of the "direct and immediate cause" standard. If the "direct and immediate cause" standard is used to resolve a proximate cause or scope of liability issue, the Committee is concerned that adding "without intermediate linkage" to that standard is redundant and will not provide meaningful guidance for a jury.

In cases where there is no question concerning scope of liability, the Committee recommends the use of the "direct cause" standard in CIVJIG 27.10.

AUTHORITIES

In *Anderson v. Christopherson*, 816 N.W.2d 626, 631 (Minn. 2012), *quoting Lewellin ex rel. Lewellin v. Huber*, 465 N.W.2d 62, 64 (Minn. 1991), the supreme court stated that "[i]n order to be subject to the statute, 'legal causation for absolute liability under the statute must be direct and immediate, i.e., without intermediate linkage.' " While there will ordinarily be no issue concerning causation, the "direct and immediate" standard is a proximate cause standard intended for use by the trier of fact where proximate cause is a fact issue.

CIVJIG 27.10 defines "direct cause" as "a cause that had a substantial part in bringing about the (collision) (accident) (event) (harm) (injury)." That causation test, standard in torts cases, could be used in cases involving multiple theories in order to avoid confusion and potentially inconsistent verdicts.

CIVJIG 38.70

NEGLIGENCE

[Give CIVJIG 25.10 (Negligence) and 27.10 (Direct Cause]

USE NOTE

Negligence may be asserted in addition to a common law strict liability theory in cases involving domestic animals. In cases involving attacks or injuries by dogs, both theories may be asserted in addition to the statutory liability theory under M.S.A. § 347.22. In cases involving multiple theories, the differing structure of liability standards and defenses requires careful consideration in structuring special verdict forms.

The elements of negligence are the same in animal injury cases. The standard instructions on negligence and direct cause should be given in those cases.

AUTHORITIES

Depending on the animal that causes the injury, the plaintiff may assert a negligence theory in addition to a common law strict liability theory in cases involving domestic animals, and a statutory absolute liability theory under M.S.A. § 347.22 in cases involving dogs. *See Ryman v. Alt*, 266 N.W.2d 504 (Minn. 1978) (scienter action and negligence claim may both be asserted); *Lewellin ex rel. Lewellin v. Huber*, 465 N.W.2d 62, 65 (Minn. 1991) (dog injury statute is not the only theory of recovery that may be asserted in a dog injury case).

The elements of a negligence claim are the standard elements in animal injury cases. *See Boitz v. Preblich*, 405 N.W.2d 907, 912 (Minn. Ct. App. 1987).

CIVJIG 38.80

KEEPING OR HARBORING

Keeper of a dog

> A person is a "keeper" of a dog if that person acts as if (he) (she) is the owner of the dog, but without legally owning the dog.

Harborer of a dog

> A person "harbors" a dog if that person [with or without the permission of the owner] provides lodging, shelter, or provides a place for the dog to stay for a limited purpose or time.

USE NOTE

This instruction is appropriate for use in a case where the issue of whether a person keeps or harbors a dog is in issue. It applies to claims under M.S.A. § 347.22. It could also apply in cases involving scienter actions.

The bracketed language should be used only if there is an issue as to whether the person harboring the dog had permission to do so.

AUTHORITIES

M.S.A. § 347.22 provides that the term "owner includes any person harboring or keeping a dog," although the "owner shall be primarily liable." In *Anderson v. Christopherson*, 816 N.W.2d 626, 632–33 (Minn. 2012), the supreme court established the standard for the definition of "owner." The court noted that the term "owner" includes "a harborer and a keeper" of a dog, and that "[a] person 'keeping' a dog is a person who 'either with or without the owner's permission undertakes to manage, control or care for it as dog owners in general are accustomed to do.' " 816 N.W.2d at 632, citing *Verrett v. Silver*, 309 Minn. 275, 277, 244 N.W.2d 147, 149 (1976). "[A] keeper acts as if he or she is the owner but without legal ownership of a dog." 816 N.W.2d at 632.

A different standard applies to determine whether a parson is harboring a dog:

> A person "harboring" a dog is a person who affords lodging, shelters, or gives refuge to a dog for a limited purpose or time . . . . This is

> because keeping requires "more than the mere harboring" of a dog, or harboring itself would simply be the same as "keeping." Id. (emphasis added). However, harboring must involve "something more than a meal of mercy to a stray dog or the casual presence of a dog on someone's premises."

816 N.W.2d at 632, citing *Verrett v. Silver*, 309 Minn. 275, 277, 244 N.W.2d 147, 149 (1976). The court added that "harboring" must involve " 'something more than a meal of mercy to a stray dog or the casual presence of a dog on someone's premises.' " 816 N.W.2d at 632–33, quoting *Verrett v. Silver*, 309 Minn. 275, 277, 244 N.W.2d 147, 149 (1976).

In *Gilbert v. Christiansen*, 259 N.W.2d 896, 897 (Minn.1977), cited by the court in *Anderson*, the supreme court held that an apartment manager did not harbor a dog when the manager had no right to exercise control over the dog inside a tenant's apartment, and that neither possession of the land where the animal is kept nor the right to exclude the animal were enough to make the landlord a harborer within the meaning of the statute. The court in *Gilbert* relied in part on the Restatement (Second) of Torts § 514 cmt. a (1977), which covers harborers of wild or abnormally dangerous animals. Comment a reads in full as follows, with the emphasis on the parts quoted in *Gilbert*:

> The rule stated in this Section imposes the same liability upon one who, although neither the owner nor the possessor of the animal, harbors it by making it part of his household. This he may do by permitting a member of his household, including those servants who are regarded as members, to keep the animal either in the house or on the premises that are occupied as the home of the family group of which he is the head. Thus *a person harbors a dog or cat by permitting his wife, son or household servant to keep it in the house or on part of his land that is occupied by the family as a group*. On the other hand, *the possession of the land on which the animal is kept, even when coupled with permission given to a third person to keep it, is not enough to make the possessor of the land liable as a harborer of the animal.* Thus a father, on whose land his son lives in a separate residence, does not harbor a dog kept by his son, although he has the power to prohibit the dog from being kept and fails to exercise the power or even if he presents the dog to his son to be so kept. The same is true when a master permits his servant to keep a dog in a house or part of the premises that is given over to the exclusive occupation of his servant. So, too, he does not become a harborer of a dog that he permits a friend to keep on his land unless he takes it into his home and thus makes it, as it were, a member of his household. Similarly, a shopkeeper does not harbor dogs that he permits his customers to bring into his shop, nor does the permission given to a particular motorist or to motorists in general to camp on a part of the possessor's land make him the harborer of those animals which, as he knows, the motorists are likely to bring upon the land.

In *Verrett v. Silver*, 309 Minn. 275, 277–78, 244 N.W.2d 147, 149

(1976), in which the issue was whether the defendant, who owned a home where a friend was staying with her dog, was liable for the dog's attack on a neighborhood child, even though the defendant was out of town at the time, the supreme court approved the following jury instruction on the meaning of harboring:

> Now, let us talk about the word owner. You must determine whether or not the defendant Silver was the owner of the dog that bit Jason. It is the finding by the Court that the defendant Silver was not the actual owner of the dog. However, it is not necessary that the plaintiff prove that the defendant Silver was the registered or actual owner since the statute defines an owner as including any person who either harbors or keeps a dog. Harboring or keeping a dog means something more than a meal of mercy to a stray dog or the casual presence of a dog on someone's premises. Harboring means to afford lodging, to shelter or to give refuge to a dog. Keeping a dog, as used in the statute before us, implies more than the mere harboring of the dog for a limited purpose or time. One becomes the keeper of a dog only when he either with or without the owner's permission undertakes to manage, control or care for it as dog owners in general are accustomed to do. Thus in order to find for the plaintiff you must find that the defendant was the owner of the dog as the term is used under the statute either as a harborer, as a keeper, as I have just defined.

CIVSVF 38.90

M.S.A. § 347.22—ABSOLUTE LIABILITY

1. Did a dog (owned) (harbored or kept) by (defendant) attack or injure (plaintiff)?

____
Yes or No

2. *If your answer to Question 1 was "Yes," then answer this question*: Was the dog's attack or injury of the plaintiff (a direct cause) of the injury sustained by (plaintiff)?

____
Yes or No

3. *If your answer to Question 2 was "Yes," then answer this question:* Did (plaintiff) provoke the dog?

____
Yes or No

Answer the following Questions on the Special Verdict Form only if you answered "Yes" to Question 2 and "No" to Question 3.

4. What amount of money will fairly and adequately compensate (plaintiff) for damages directly caused by the dog's conduct up to the time of this verdict for:

   a. [Mental distress]

   b. Past wage loss

   c. Past healthcare expenses

5. What amount of money will fairly and adequately compensate (plaintiff) for damages reasonably certain to occur in the future, directly caused by the dog's conduct:

a. [Future mental distress] $_______

b. Loss of future earning capacity $________

c. Future healthcare expenses $________

USE NOTE

This special verdict form is intended for use in cases in which the plaintiff's sole theory of recovery is based on a violation of M.S.A. § 347.22. Question 1 includes alternatives, depending on whether the defendant owned or harbored or kept the dog. Question 2 uses the standard "direct cause" jury instruction from CIVJIG 27.10. In cases where *proximate cause* is in issue and must be resolved by the jury under the standard adopted by the Minnesota Supreme Court in *Anderson v. Christopherson*, 816 N.W.2d 626, 631 (Minn. 2012) and *Lewellin ex rel. Lewellin v. Huber*, 465 N.W.2d 62, 64 (Minn.1991) (legal causation for absolute liability under the statute must be direct and immediate, i.e., without intermediate linkage), CIVJIG 38.60 may be given.

Question 3 asks whether the plaintiff provoked the dog. Provocation will be a complete bar to recovery under a § 347.22 claim. That question should be excluded if there is no issue concerning provocation. There is no comparative fault question because contributory negligence is not a defense to a claim under § 347.22. If there is an issue as to whether the injured person was "acting peaceably in any place where the person may lawfully be," a separate question addressing the issue may be added after Question 3, or it could be substituted for the provocation question if there is no issue concerning provocation.

The special verdict questions and their supporting jury instructions are as follows:

1. CIVJIG 38.30: M.S.A. § 347.22—Absolute Liability
2. CIVJIG 27.10: Direct Cause
3. CIVJIG 38.40: M.S.A. § 347.22—Provocation
4. CIVJIG 91.10: Items of Personal Damage—Past Damages—Bodily and Mental Harm

   CIVJIG 91.20: Items of Personal Damage—Past Damages—Loss of Earnings

   CIVJIG 91.15: Items of Personal Damage—Past Damages—Medical Supplies, Hospital and Medical Expense
5. CIVJIG 91.25: Items of Personal Damage—Future Damages—Bodily and Mental Harm

CIVJIG 91.20: Items of Personal Damage—Future Damages—Loss of Earning Capacity

CIVJIG 91.30: Items of Personal Damage—Future Damages—Medical Supplies, Hospital and Medical Expense

CIVSVF 38.91

NEGLIGENCE AND M.S.A. § 347.22—SINGLE PLAINTIFF AND SINGLE DEFENDANT

1. Was (defendant) negligent?

______
Yes or No

2. *If your answer to Question 1 was "Yes," then answer this Question:* Was this negligence by (defendant) a direct cause of the injuries sustained by (plaintiff)?

______
Yes or No

3. Was (plaintiff) negligent?

______
Yes or No

4. *If your answer to Question 3 was "Yes," then answer this Question:* Was this negligence by (plaintiff) a direct cause of the injuries sustained by (plaintiff)?

______
Yes or No

If you answered "Yes" to Question 2 and you also answered "Yes" to Question 4, then answer Question 5.

5. Taking all of the negligence that contributed as a direct cause of the injuries sustained by (plaintiff) as 100%, what percentage of negligence do you attribute to:

(defendant)
If you answered "Yes" to Question 2 ______%

(plaintiff)

If you answered "Yes" to Question 4 ________%

TOTAL 100%

6. Did a dog (owned) (harbored or kept) by (defendant) attack or injure (plaintiff)?

____
Yes or No

7. *If your answer to Question 6 was "Yes," then answer this question*: Was the dog's attack of or injury of the plaintiff a direct cause of the injuries (plaintiff) sustained?

____
Yes or No

8. *If your answer to Question 7 was "Yes," then answer this question:* Did (plaintiff) provoke the dog?

____
Yes or No

Answer the following Questions on the Special Verdict Form only if you answered "Yes" to Question 2 OR "Yes" to Question 6 and "No" to Question 8.

9. What amount of money will fairly and adequately compensate (plaintiff) for damages up to the time of this verdict for:

a.	[Mental distress]	$________
b.	Past wage loss	$________
c.	Past healthcare expenses	$________

10. What amount of money will fairly and adequately compensate (plaintiff) for damages reasonably certain to occur in the future:

a. [Future mental distress] $________

b. Loss of future earning capacity $________

c. Future healthcare expenses $________

USE NOTE

This special verdict form is intended for use in cases in which the plaintiff asserts both negligence and statutory liability theories. In *Clark v. Connor*, 843 N.W.2d 785,787–88 (Minn. Ct. App. 2014), the Minnesota Court of Appeals held that statutory liability and common law negligence theories are subject to comparison under the Comparative Fault Act, but in a case involving a single plaintiff and single defendant-dog owner or keeper it is unnecessary to include the statutory liability theory in the comparison for two reasons. First, Clark was concerned with the apportionment of fault between two defendants, not a single plaintiff and defendant who is liable under both theories. Second, any finding of contributory negligence on the part of the plaintiff would not be a bar to recovery under the statutory liability theory, unless the plaintiff provoked the dog or was not acting peaceably in a place where the plaintiff had a right to be. If the plaintiff is barred from recovery under the statutory liability theory because the plaintiff either provoked the dog or was not acting peaceably in a place where the plaintiff had a lawful right to be, the plaintiff may still be entitled to recover under the negligence theory if the plaintiff's negligence was not greater than the defendant's. The Committee takes no position, however, on whether a finding of provocation would also be a bar to recovery under the negligence theory.

If there is an issue as to whether the injured person was "acting peaceably in any place where the person may lawfully be," a separate question addressing the issue may be added after Question 8, or substituted for the provocation question if there is no issue concerning provocation.

The special verdict questions and their supporting jury instructions are as follows:

1. CIVJIG 25.10: Negligence and Reasonable Care—Basic Definition
2. CIVJIG 27.10: Direct Cause
3. CIVJIG 25.10: Negligence and Reasonable Care—Basic Definition
4. CIVJIG 27.10: Direct Cause

5. CIVJIG 28.15: Comparative Fault

6. CIVJIG 38.30: M.S.A. § 347.22—Absolute Liability

7. CIVJIG 27.10: Direct Cause

8. CIVJIG 38.40: M.S.A. § 347.22—Provocation

9. CIVJIG 91.10: Items of Personal Damage—Past Damages—Bodily and Mental Harm

   CIVJIG 91.20: Items of Personal Damage—Past Damages—Loss of Earnings

   CIVJIG 91.15: Items of Personal Damage—Past Damages—Medical Supplies, Hospital and Medical Expense

10. CIVJIG 91.25: Items of Personal Damage—Future Damages—Bodily and Mental Harm

    CIVJIG 91.20: Items of Personal Damage—Future Damages—Loss of Earning Capacity

    CIVJIG 91.30: Items of Personal Damage—Future Damages—Medical Supplies, Hospital and Medical Expense

CIVSVF 38.92

NEGLIGENCE AND M.S.A. § 347.22—TWO DEFENDANTS

1. Was (non-dog owner defendant) negligent?

____
Yes or No

2. *If your answer to Question 1 was "Yes," then answer this Question:* Was this negligence by (non-dog-owner defendant) a direct cause of the injuries sustained by (plaintiff)?

____
Yes or No

3. Did a dog (owned) (harbored or kept) by (defendant) attack or injure (plaintiff)?

____
Yes or No

4. *If your answer to Question 3 was "Yes," then answer this question*: Was the dog's attack or injury of the plaintiff a direct cause of the injuries sustained by (plaintiff)?

____
Yes or No

5. *If your answer to Question 4 was "Yes," then answer this question:* Did (plaintiff) provoke the dog?

____
Yes or No

6. Was (defendant dog owner or harborer or keeper) negligent in (specify the alleged negligence)?

____
Yes or No

7. *If your answer to Question 1 was "Yes," then answer this Question:* Was this negligence by (defendant owner or harborer or keeper) a direct cause of the injuries sustained by (plaintiff)?

____
Yes or No

8. Was (plaintiff) negligent?

____
Yes or No

9. *If your answer to Question 3 was "Yes," then answer this Question:* Was this negligence by (plaintiff) a direct cause of the injuries sustained by (plaintiff)?

____
Yes or No

If you answered "Yes" to Question 2 and "Yes" to either Question 7 or Question 9, OR if you answered "No" to Question 2 and "Yes" to Question 5, Question 7, and Question 9, then answer Question 10.

10. Taking all of the fault that contributed as a direct result to the injuries sustained by (plaintiff) as 100%, what percentage of fault do you attribute to:

(non-dog owner defendant)
If you answered "Yes" to Question 2 ________%

(defendant dog owner, harborer or Keeper) ________%
If you answered "No" to Question 5 and
Yes" to Question 7, or if you answered "Yes"
to Question 5 and "Yes" to Question 7, or if
you answered "No" to Question 5 and "No"
to Question 7

(plaintiff)
If you answered "Yes" to Question 9 ________%

TOTAL 100%

Answer the following Questions on the Special Verdict Form only if you answered "Yes" to Question 2 OR "Yes" to Question 4 and "No" to Question 5 OR "Yes" to Question 7.

11. What amount of money will fairly and adequately compensate (plaintiff) for damages up to the time of this verdict for:

a.	[Mental distress]	$________
b.	Past wage loss	$________
c.	Past healthcare expenses	$________

12. What amount of money will fairly and adequately compensate (plaintiff) for damages reasonably certain to occur in the future for:

a.	[Future mental distress]	$________
b.	Loss of future earning capacity	$________
c.	Future healthcare expenses	$________

USE NOTE

This special verdict form is intended for use in cases where there is a second defendant who is not the owner or keeper of the dog.

The form is complex because of the variance in findings that will lead to a comparison of fault. Contributory negligence is not a defense to a claim under M.S.A. § 347.22. *Seim v. Garavalia*, 306 N.W.2d 806, 812 (Minn.1981). The plaintiff's negligence has to be taken into consideration, however, in determining the percentage of fault that should be assigned to a non-dog-owning defendant who is found to be negligent. Liability under M.S.A. § 347.22 may also be compared to the negligence of a non-dog-owning defendant. Clark v. Connor, 843 N.W.2d 785,787–88 (Minn. Ct. App. 2014). On the other hand, the plaintiff's contributory negligence, if any, is not a defense to a claim under M.S.A. § 347.22.

This form provides for the comparison of fault where the answers to the special verdict questions find the non-dog-owning defendant negligent and the dog owner, harborer, or keeper liable under a statutory liability or negligence theory or both. It provides for the apportionment of fault if the plaintiff is found to be contributorily negligent and the non-dog-owning defendant is found to be negligent and the dog owner, harborer, or keeper is also found either negligent or liable under § 347.22. Fault is not apportioned if the only findings are that the plaintiff was negligent but that the dog owner, harborer, or keeper was liable only under the statutory liability theory.

The special verdict questions and their supporting jury instructions are as follows:

1. CIVJIG 25.10: Negligence and Reasonable Care—Basic Definition
2. CIVJIG 27.10: Direct Cause
3. CIVJIG 38.30: M.S.A. § 347.22—Absolute Liability
4. CIVJIG 27.10: Direct Cause
5. CIVJIG 38.40: Provocation
6. CIVJIG 25.10: Negligence and Reasonable Care—Basic Definition
7. CIVJIG 27.10: Direct Cause
8. CIVJIG 25.10: Negligence and Reasonable Care—Basic Definition
9. CIVJIG 27.10: Direct Cause
10. CIVJIG 28.15: Comparative Fault
11. CIVJIG 91.10: Items of Personal Damage—Past Damages—Bodily and Mental Harm

    CIVJIG 91.20: Items of Personal Damage—Past Damages—Loss of Earnings

    CIVJIG 91.15: Items of Personal Damage—Past Damages—Medical Supplies, Hospital and Medical Expense
12. CIVJIG 91.25: Items of Personal Damage—Future Damages—Bodily and Mental Harm

    CIVJIG 91.20: Items of Personal Damage—Future Damages—Loss of Earning Capacity

CIVJIG 91.30: Items of Personal Damage—Future Damages—Medical Supplies, Hospital and Medical Expense

CIVSVF 38.93

COMMON LAW STRICT LIABILITY (SCIENTER) AND NEGLIGENCE

1. Did (animal) have a vicious or dangerous propensity?

______
Yes or No

2. *If your answer to Question 1 was "Yes," then answer this Question:* Did (owner) (keeper) have notice of that vicious or dangerous propensity.

______
Yes or No

3. *If your answer to Question 2 was "Yes," then answer this Question:* Was (animal's) vicious or dangerous propensity a direct cause of the injuries sustained by (plaintiff)?

______
Yes or No

4. Was (defendant) negligent?

______
Yes or No

5. *If your answer to Question 4 was "Yes," then answer this Question:* Was this negligence by (defendant) a direct cause of the injuries sustained by (plaintiff)?

______
Yes or No

6. Was (plaintiff) negligent?

____
Yes or No

7. Was this negligence by (plaintiff) a direct cause of the injuries sustained by (plaintiff)?

____
Yes or No

If you answered "Yes" to either Question 2 or Question 4 AND you also answered "Yes" to Question 7, then answer Question 8.

8. Taking all of the fault that contributed as a direct result to the injuries sustained by (plaintiff) as 100%, what percentage of negligence do you attribute to:

(defendant)
If you answered "Yes" to Question 3, 5, or both 3 and 5 ________%

(plaintiff)
If you answered "Yes" to Question 4 ________%

TOTAL 100%

Answer the following Questions on the Special Verdict Form only if you answered "Yes" to Question 3 or "Yes" to Question 5.

9. What amount of money will fairly and adequately compensate (plaintiff) for damages up to the time of this verdict for:

a.	[Mental distress]	$________
b.	Past wage loss	$________
c.	Past healthcare expenses	$________

10. What amount of money will fairly and adequately compensate (plaintiff) for damages reasonably certain to occur in the future:

a.	[Future mental distress]	$________
b.	Loss of future earning capacity	$________
c.	Future healthcare expenses	$________

USE NOTE

This special verdict form is intended for use in cases where the plaintiff asserts both common law strict liability and negligence claims. Question 1 uses the terms “vicious or dangerous” propensity. As in CIVJIG 38.30, on term or the other should be used, depending on the case.

Question 3 asks whether there is a causal link between the plaintiff's injuries and the vicious or dangerous propensity of the animal. That link is necessary in a strict liability claim to distinguish between injuries caused by the vicious or dangerous propensity and injuries that are attributable to the normal tendencies of ordinary animals. *See* Restatement (Second) of Torts § 23 cmt. h (2010). Only the former should subject the owner or keeper of an animal with a dangerous or vicious propensity to strict liability.

While Question 8 provides for the comparison of fault, including the plaintiff's contributory negligence, the Committee takes no position on the issue of whether a plaintiff's contributory negligence in failing to realize the danger presented by the animal is a defense to a common law strict liability action.

The special verdict questions and their supporting jury instructions are as follows:

1. CIVJIG 38.10: Scienter Action—Domestic Animals
2. CIVJIG 38.10: Scienter Action—Domestic Animals
3. CIVJIG 27.10: Direct Cause
4. CIVJIG 25.10: Negligence and Reasonable Care—Basic Definition
5. CIVJIG 27.10: Direct Cause
6. CIVJIG 25.10: Negligence and Reasonable Care—Basic Definition

7. CIVJIG 27.10: Direct Cause
8. CIVJIG 28.15: Comparative Fault
9. CIVJIG 91.10: Items of Personal Damage—Past Damages—Bodily and Mental Harm

   CIVJIG 91.20: Items of Personal Damage—Past Damages—Loss of Earnings

   CIVJIG 91.15: Items of Personal Damage—Past Damages—Medical Supplies, Hospital and Medical Expense
10. CIVJIG 91.25: Items of Personal Damage—Future Damages—Bodily and Mental Harm

    CIVJIG 91.20: Items of Personal Damage—Future Damages—Loss of Earning Capacity

    CIVJIG 91.30: Items of Personal Damage—Future Damages—Medical Supplies, Hospital and Medical Expense

CATEGORY 40

BUSINESS TORTS—UNFAIR COMPETITION

Table of Instructions

CIVJIG 40.10 Defamation—Business Organizations
CIVJIG 40.15 Product Disparagement
CIVJIG 40.20 Trade Secret—Definition
CIVJIG 40.25 Trade Secret—Misappropriation
CIVJIG 40.30 Interference With Contractual Relationships
CIVJIG 40.35 Interference With Prospective Economic Advantage
CIVJIG 40.40 Justification
CIVJIG 40.45 Interference With Contractual Relationships—Damages

INTRODUCTORY NOTE

This section contains a collection of jury instructions covering what might loosely be termed business torts. It includes, but is not limited to, unfair competition claims.

The court of appeals has characterized unfair competition as "a general category of torts recognized by Minnesota courts to protect commercial interests." *Midwest Sports Marketing, Inc. v. Hillerich & Bradsby of Canada, Ltd.*, 552 N.W.2d 254 (Minn. Ct. App. 1996), rev. denied (Minn. Sept. 20, 1996), *citing Rehabilitation Specialists v. Koering*, 404 N.W.2d 301, 305 (Minn. Ct. App. 1987). It does not have specific elements. *Rehabilitation Specialists*, 404 N.W.2d at 305; *also see* Dan B. Dobbs et al., The Law of Torts 2d § 735, at 1300 (2011); Prosser & Keeton on Torts § 130, at 1015 (5th ed. 1984); Restatement (Third) of Unfair Competition § 1 and comments (1995).

In *Radium Remedies Co. v. Weiss*, 173 Minn. 342, 349, 217 N.W. 339, 341 (1928), the Minnesota Supreme Court discussed the concept of unfair competition:

> No fixed rule can perhaps be laid down as to what constitutes unfair competition. It has been said that unfair competition consists "in the simulation by one person, for the purpose of deceiving the public, of the name, symbols, or devices employed by a business rival, or the substitution of the goods or wares of one person for those of another, thus falsely inducing the purchase of his wares and

> thereby obtaining for himself the benefits properly belonging to his competitor." . . . An exclusive right to use a tradename is not necessary in order to entitle the user to restrain another from unfair use or imitation thereof . . . . It is not important in this case whether the wrong here complained of be considered unfair competition or not. It was a breach of confidence and wrongful misappropriation of qualifiedly secret formulas and process by the defendant Weiss, and the same liability would follow as in a case of unfair competition.

Unfair competition may include "tortious interference with contract, improper use of trade secrets, and an employee's breach of a duty of loyalty to his or her employer," *Midwest Sports Marketing*, 552 N.W.2d at 267; interference with prospective advantage, *Kellar v. VonHoltum*, 568 N.W.2d 186 (Minn. Ct. App. 1997), rev. denied (Minn. Oct. 30, 1997); and infringement of a trade name, *Howards Clothes, Inc. v. Howard Clothes Corp.*, 236 Minn. 291, 295, 52 N.W.2d 753, 757 (1952).

CIVJIG 40.10

DEFAMATION—BUSINESS ORGANIZATIONS

Defamation of a business organization

A communication is defamatory if it tends to prejudice a (corporation) (business)'s credit, property, or operation.

USE NOTE

This instruction should be used in cases where a corporation is defamed. The cause of action for defamation is separate from any action for product disparagement. In cases where a business is defamed, it is entitled to presumed damages. *See* CIVJIG 50.50 on presumed damages. *See* Category 50 for general defamation instructions.

AUTHORITIES

In *Advanced Training Systems, Inc. v. Caswell Equipment Co.*, 352 N.W.2d 1, 10 (Minn. 1984):

> The trial court's holding that a corporation may recover in libel without showing special pecuniary damages was correct under present Minnesota libel law. This court has suggested that corporate plaintiffs stand on the same footing as individuals in defamation actions. See *Martin County Bank v. Day*, 73 Minn. 195, 197, 75 N.W. 1115, 1115 (1898). The only distinction generally recognized is one that the trial judge called to the jury's attention. To recover in libel, a corporation must show that defendant's written statements directly tended to affect the credit, property or business of the corporate plaintiff. See *National Refining Co.*, 20 F.2d at 766; *Erick Bowman Remedy Co.*, 17 F.2d at 257; Prosser, supra, § 111 at 745. This, of course, is only one category of words that may be defamatory when they refer to an individual.

In *Dairy Stores, Inc. v. Sentinel Publishing Co.*, 104 N.J. 125, 516 A.2d 220 (1986), the New Jersey Supreme Court noted the distinctions between product disparagement and defamation claims:

> Product disparagement and defamation are two distinct torts. Although they sometimes overlap, there are important differences between them that arise primarily from the unique interests that they are intended to protect. Product disparagement protects injured plaintiffs, corporate or individual, by compensating them for pecuniary harm caused by false statements about their products. Defamation protects those plaintiffs' good name and character by compensating them for damage to their reputations. Succinctly

> stated, "[d]efamation of a corporation injures the reputation of the corporation; product disparagement injures the reputation of its products." Note, "Corporate Defamation and Product Disparagement: Narrowing the Analogy to Personal Defamation," 75 Colum. L. Rev. 963, 969 (1975) . . . . For example, if a defendant declares that a company refuses to pay its debts, the reputation of the company will be damaged, but its ability to sell its product will not be. The statement is defamatory, but it does not disparage a product . . . . In contrast, if a defendant says that a company's product is of poor quality, its sales will be hurt, but public perception of its integrity and its reputation will not be affected. The statement disparages a product, but it is not defamatory.

Dairy Stores, Inc. v. Sentinel Publishing Co., 516 A.2d at 237 (Garibaldi, J., concurring). The elements of a product disparagement claim are more stringent than a defamation claim. *Dairy Stores, Inc. v. Sentinel Publishing Co.*, 516 A.2d at 237. In *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1502 (8th Cir. 1992), cert. denied, 506 U.S. 1080, 113 S.Ct. 1048, 122 L.Ed.2d 356 (1993), the Eighth Circuit, applying Minnesota law, concluded that proof of special damage was required in business disparagement claims. However, the court of appeals in *Imperial Developers, Inc. v. Seaboard Surety Co.*, 518 N.W.2d 623, 627–28 (Minn. Ct. App. 1994), rev. denied (Minn. Aug. 24, 1994), disagreed with the Eighth Circuit's interpretation of *Advanced Training Systems*, because the court there did not distinguish between business and product disparagement cases.

Presumed damages are available in a business defamation action if the defamation involves a matter of private concern. *Touma v. St. Mary's Bank*, 712 A.2d 619, 622 (N.H. 1998). The Minnesota Court of Appeals has taken the position that presumed damages are available in private defamation actions where no public figure, official, or issue is involved. For a more detailed discussion *see* CIVJIG 50.50, Authorities. If the claim involves a matter of public concern, , however, the constitutional standard in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), may apply.

Research References

West's Key Number Digest
Libel and Slander ⚷9, 124

CIVJIG 40.15

PRODUCT DISPARAGEMENT

Deceptive trade practice

A deceptive trade practice occurs when a person or company:

1. In the conduct of its own business, vocation or occupation,
2. Disparages the goods or services of a competitor by using false or misleading facts,
3. Resulting in financial loss for the competitor.

USE NOTE

Business or product disparagement claims must be differentiated from business defamation claims. Special damage is a requirement in a case involving product disparagement.

AUTHORITIES

Business disparagement claims may be based on common law or statute. The elements of the claims are essentially the same. *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1502 (8th Cir. 1992). The only remedy for violation of the statute, however, is injunctive relief. M.S.A. § 325D.45, subd. 1. *See also Johnson v. Nationstar Mortg., LLC*, 2011 WL 6306681 (Minn. Ct. App. Dec. 19, 2011) (unrep.).

M.S.A. § 325D.44, subd. 1(8), states that "A person engages in a deceptive trade practice when, in the course of business, vocation, or occupation, the person . . . disparages the goods, services, or business of another by false or misleading representation of fact." The statutory claim is not intended to affect common law claims. M.S.A. § 325D.44, subd. 3. The statute "is clearly aimed at events occurring in the course of trade or business." *Northwest Airlines, Inc. v. Friday*, 617 N.W.2d 590, 595 (Minn. Ct. App. 2000).

In *Advanced Training Systems, Inc. v. Caswell Equipment Co.*, 352 N.W.2d 1, 7 (Minn. 1984), the court noted the requirement of special damage in a case involving product disparagement:

> It has long been the law that plaintiff may not recover for product disparagement unless plaintiff is able to prove special damages in

> the form of pecuniary loss directly attributable to defendant's false statements . . . . Where plaintiff cannot show loss of specific sales, the modern view allows plaintiff to prove a general decline of business, so long as this is shown to be the result of defendant's disparaging statements and other possible causes are eliminated.

In *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1502 (8th Cir. 1992), cert. denied, 506 U.S. 1080, 113 S.Ct. 1048, 122 L.Ed.2d 356 (1993), the Eighth Circuit, applying Minnesota law, concluded that proof of special damage was required in business disparagement claims. However, the court of appeals in *Imperial Developers, Inc. v. Seaboard Surety Co.*, 518 N.W.2d 623, 628 n. 2 (Minn. Ct. App. 1994), rev. denied (Minn. Aug. 24, 1994), disagreed with the Eighth Circuit's interpretation of *Advanced Training Systems*, because the court did not distinguish between business and product disparagement cases.

Research References

West's Key Number Digest
Libel and Slander ⚷130, 139

CIVJIG 40.20

TRADE SECRET—DEFINITION

A trade secret is information such as a:

a. Formula

b. Pattern

c. Compilation (or collection of information from a number of sources)

d. Program

e. Device

f. Method

g. Technique, or

h. Process,

that

1. derives actual or potential independent economic value from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and

2. is the subject of reasonable efforts under the circumstances to maintain its secrecy.

[The trade secret is still a trade secret even when the employee or person who acquired it had not been specifically told or notified that it was a trade secret. It must be reasonable under the circumstances for the employee to know or have reason to know the owner expected the secret to be kept.]

USE NOTE

This instruction should be used in cases where there is a claim for misappropriation of a trade secret. The instruction tracks the statutory definition of "trade secret" in M.S.A. § 325C.01, subd. 5.

AUTHORITIES

The definition of trade secret is taken from M.S.A. § 325C.01, subd. 5:

> "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:
>
> > (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and
> >
> > (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.
>
> The existence of a trade secret is not negated merely because an employee or other person has acquired the trade secret without express or specific notice that it is a trade secret if, under all the circumstances, the employee or other person knows or has reason to know that the owner intends or expects the secrecy.

In deciding if information can be deemed a trade secret under the Act, M.S.A. § 325C.01, subd. 5, the Minnesota Supreme Court has established a three factor analysis:

> (1) the information must not be generally known or readily ascertainable; (2) the information must derive independent economic value from secrecy; and (3) plaintiff must make reasonable efforts to maintain secrecy.

Electro-Craft Corp. v. Controlled Motion, Inc., 332 N.W.2d 890, 899–901 (Minn. 1983). In order for a trade secret to have independent economic value it must be delineated with specificity. *Jostens, Inc. v. National Computer Sys., Inc.*, 318 N.W.2d 691, 699 (Minn. 1982).

The Trade Secrets Act specifically provides that sections 325C.01 to 325C.07 "displace conflicting tort, restitutionary, and other law of this state providing civil remedies for misappropriation of a trade secret." M.S.A. § 325C.07(a).

Research References

West's Key Number Digest
Torts ⚷210

CIVJIG 40.25

TRADE SECRET—MISAPPROPRIATION

"Misappropriation" means:

1. [Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means.]

2. [Disclosure or use of a trade secret of another without express or implied consent, by someone who used improper means to acquire knowledge of the trade secret.]

3. [Disclosure or use of a trade secret of another without express or implied consent, by someone who knew or had reason to know that his or her knowledge of the trade secret at the time of the disclosure or use was derived from or through a person who had used improper means to acquire it.]

4. [Disclosure or use of a trade secret of another without express or implied consent, by someone who knew or had reason to know his or her knowledge of the trade secret at the time of the disclosure or use was acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use.]

5. [Disclosure or use of a trade secret of another without express or implied consent, by someone who knew or had reason to know his or her knowledge of the trade secret at the time of the disclosure or use was derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use.]

6. [Disclosure or use of a trade secret of another without express or implied consent, by someone who knew or had reason to know that it was a

> trade secret and that knowledge of it had been acquired by accident or mistake before a material change of his or her position.]

["Improper means" includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.]

["Person" means a natural person, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity.]

USE NOTE

Trade secret misappropriation may occur in a variety of ways. The statute defining misappropriation is complex. This instruction breaks misappropriation into its several components for purposes of clarity. Only the relevant bracketed parts of the instruction should be used in an individual case. The last two bracketed paragraphs are statutory definitions that should be used only when those terms are specifically used in the instructions.

AUTHORITIES

M.S.A. §§ 325C.01–325C.08 is the Uniform Trade Secrets Act. The Act protects specific types of information through actions for misappropriation. The Act provides for money damages and injunctions.

M.S.A. § 325C.01, subd. 3, defines "misappropriation" to mean:

> (i) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
>
> (ii) disclosure or use of a trade secret of another without express or implied consent by a person who
>
> > (A) used improper means to acquire knowledge of the trade secret; or
> >
> > (B) at the time of disclosure or use, knew or had reason to know that the discloser's or user's knowledge of the trade secret was

> (I) derived from or through a person who had utilized improper means to acquire it;
>
> (II) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
>
> (III) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
>
> (C) before a material change of the discloser's or user's position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

M.S.A. § 325C.01, subd. 2, defines "improper means" to include "theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means." Misappropriation of trade secrets is an intentional tort. *Hagen v. Burmeister & Associates, Inc.*, 633 N.W.2d 497, 503 (Minn. 2001). There can be no action for misappropriation without a proven trade secret, even if the actions of the defendant were wrongful. *Electro-Craft Corp. v. Controlled Motion, Inc.*, 332 N.W.2d 890, 897 (Minn. 1983); *Jostens, Inc. v. National Computer Systems*, 318 N.W.2d 691, 701 (Minn. 1982).

M.S.A. § 325C.01, subd.4, defines "person" to mean "a natural person, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity."

M.S.A. § 325C.03 provides for the award of damages for misappropriation:

> (a) Except to the extent that a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation renders a monetary recovery inequitable, a complainant is entitled to recover damages for misappropriation. Damages can include both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss. In lieu of damages measured by any other methods, the damages caused by misappropriation may be measured by imposition of liability for a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret.
>
> (b) If willful and malicious misappropriation exists, the court may award exemplary damages in an amount not exceeding twice any award made under paragraph (a).

M.S.A. § 325C.07 makes it clear that the Act displaces conflicting laws:

(a) Except as provided in paragraph (b), sections 325C.01 to 325C.07 displace conflicting tort, restitutionary, and other law of this state providing civil remedies for misappropriation of a trade secret.

(b) Sections 325C.01 to 325C.07 do not affect:

(1) contractual remedies, whether or not based upon misappropriation of a trade secret;

(2) other civil remedies that are not based upon misappropriation of a trade secret; or

(3) criminal remedies, whether or not based upon misappropriation of a trade secret.

Research References

West's Key Number Digest
Torts ⚷210

CIVJIG 40.30

INTERFERENCE WITH CONTRACTUAL RELATIONSHIPS

Definition of "intentional interference with a contractual relationship"

There is an intentional interference with a contractual relationship if:

1. There was a contract
2. (Defendant) knew about the contract
3. (Defendant) intentionally caused the breach of the contract
4. (Defendant's) actions were not justified.

USE NOTE

This instruction is intended for use in cases involving intentional interference with contractual relationships. For a definition of intent, *see* CIVJIG 60.10. *See* CIVJIG 40.40 for guidance in handling the justification issue.

AUTHORITIES

The Minnesota courts have used two primary categories of interference to establish an unjustified wrongful interference. *See Continental Research, Inc. v. Cruttenden, Podesta & Miller*, 222 F.Supp. 190, 200, 202 (D.Minn. 1963). In *Furlev Sales & Assocs. Inc. v. North Am. Automotive Warehouse, Inc.*, 325 N.W.2d 20, 27 (Minn. 1982), the supreme court stated that "[i]nterference is unjustifiable when it is done for the indirect purpose of injuring the plaintiff or benefiting the defendant." *See also Stephenson v. Plastics Corp. of Am.*, 276 Minn. 400, 416, 150 N.W.2d 668, 680 (1967); *Johnson v. Gustafson*, 201 Minn. 629, 634, 277 N.W. 252, 255 (1938).

The right to recover is not necessarily limited to one of the contracting parties. *Jensen v. Lundorff*, 258 Minn. 275, 103 N.W.2d 887, 890 (1960). An intentional interference with a relationship from which a legally enforceable benefit flows is actionable by the party who is damaged by the interference. Therefore, an action for interference with a contract is not exclusive to the contracting parties, and can be maintained by a non-contracting party who would benefit from the contract. However, a party may not sue another party to the same contract for breaches *inter se. See Wild v. Rarig*, 302 Minn. 419, 443, n. 16, 234 N.W.2d 775, 791, n. 16 (1975).

Corporate officers are generally not personally liable for interference with contracts if they merely cause the corporation not to perform the contract. *Furlev Sales & Assocs., Inc. v. North American Automotive Warehouse, Inc.*, 325 N.W.2d 20, 26 (Minn. 1982); *Bouten v. Richard Miller Homes, Inc.*, 321 N.W.2d 895, 900 (Minn. 1982); *see also Space Center, Inc. v. 451 Corp.*, 298 N.W.2d 443, 452 (Minn. 1980).

There are five elements of a claim for intentional interference with contractual relationships:

1. A contract existed.
2. The alleged tortfeasor knew of the contract.
3. The tortfeasor intentionally procured its breach.
4. The tortfeasor's actions were not justified.
5. Damages resulted.

Kjesbo v. Ricks, 517 N.W.2d 585, 588 (Minn. 1994); *Furlev Sales & Assoc., Inc., v. North American Auto. Warehouse, Inc.*, 325 N.W.2d 20, 25 (Minn. 1982); *Metge v. Central Neighborhood Improvement Association*, 649 N.W.2d 488, 500 (Minn. Ct. App. 2002); *Harman v. Heartland Food Co.*, 614 N.W.2d 236, 241 (Minn. Ct. App. 2000).

1. A Contract Existed. An existing written or oral contract is an essential element of an action for wrongful interference with a contractual relationship. *See Malevich v. Hakola*, 278 N.W.2d 541, 544 (Minn. 1979).

2. The defendant Must Have Known of the Contract. Knowledge is also an essential element of a cause of action for willful interference with contractual relations. It is not necessary to prove actual knowledge. It is sufficient to show that a defendant had knowledge of facts that, if followed by reasonable inquiry, would have led to a complete disclosure of the contractual relations and the rights of the parties. *See Swaney v. Crawley*, 154 Minn. 263, 265, 191 N.W. 583, 584 (1923); *Twitchell v. Nelson*, 131 Minn. 375, 386, 155 N.W. 621, 624 (1915).

3. The defendant Intentionally Procured Its Breach. To be liable for tortious interference with a contract, the defendant must have intentionally procured the breach of the contract. *Furlev Sales & Assoc., Inc., v. North American Auto. Warehouse, Inc.*, 325 N.W.2d 20, 25 (Minn. 1982). For a definition of intent, *see* CIVJIG 60.10.

4. The defendant's Actions Were Not Justified. Justification or privilege is a defense to an action for intentional interference with contractual relationships, *Nordling v. Northern States Power Co.*, 478 N.W.2d 498 (Minn. 1991), and the defendant has the burden of proving that his interference was justified. *Kjesbo v. Ricks*, 517 N.W.2d 585, 588 (Minn. 1994); *Furlev Sales and Associates, Inc. v. North American Automotive Warehouse*, 325 N.W.2d 20, 25 (Minn. 1982); *Stephenson v. Plastics Corp. of Am.*, 276 Minn. 400, 416, 150 N.W.2d 668, 679–80 (1967).

Justification is lost, however, if a bad motive is present. *Nording*, 478 N.W.2d at 506. In *Metge v. Central Neighborhood Improvement Ass'n*, 649 N.W.2d 488, 500 (Minn. Ct. App. 2002), rev. dismissed (Minn. Oct. 15, 2002), the court of appeals said that "[i]n other words, while bad motive or malice may not be an element of the tort of tortious interference, it is often persuasive evidence on whether the defendant's conduct was proper and justified or improper and not justified." *Metge v. Central Neighborhood Improvement Ass'n*, 649 N.W.2d at 500, *citing Stephenson v. Plastics Corp. of America*, 276 Minn. 400, 417 n. 17, 150 N.W.2d 668, 680 n. 17 (1967).

In *Royal Realty*, the court said that:

> According to the vast majority of decisions, even though the means employed in procuring the breach are in themselves lawful, where the inducement is without justification it may nevertheless be actionable.

244 Minn. at 291–92, 69 N.W.2d at 671.

In *Moore v. Hoff*, 821 N.W.2d 591 (Minn. Ct. App. 2012), the plaintiff claimed that defamatory statements in the defendant's blog and e-mails resulted in termination of plaintiff's employment. Moore sued Hoff for defamation, intentional interference with contract, and interference with prospective advantage. Before trial, the district court held Moore was a "limited-purpose public figure" and the alleged defamatory statement was related to a public controversy. At trial, the jury determined that the allegedly defamatory statement was not false, but awarded Moore damages on his intentional interference and prospective advantage claims. The court of appeals held that communicating true information could not be the basis for a claim of intentional interference with contract. "Regardless of the motivation of the messenger, if the information conveyed is true, it is not appropriate for liability to attach." *Moore v. Hoff*, 821 N.W.2d 591, 597 (Minn. Ct. App. 2012).

CIVJIG 50.25, covering truth/falsity in defamation cases, may also be used in intentional interference cases.

Research References

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CIVJIG 40.35

INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE

Interference with prospective economic advantage

There is an interference with a prospective economic advantage or benefit if:

1. (Plaintiff) had a reasonable expectation of economic advantage or benefit, and
2. (Defendant) knew about that reasonable expectation of economic advantage or benefit, and
3. (Defendant) intentionally interfered with (plaintiff's) reasonable expectation of economic advantage or benefit, and
4. The intentional interference was [insert independent tort or violation of a state or federal statute or regulation], and
5. In the absence of the wrongful act of (defendant), it is reasonably probable that (plaintiff) would have realized that economic advantage or benefit.

USE NOTE

This instruction is intended for use in cases involving interference with prospective advantage. Intentional interference with prospective economic advantage must involve conduct that is independently tortious or a violation of a state or federal statute or regulation. The alleged wrongful conduct should be defined for the jury. Separate instructions may be needed defining the wrongful conduct. For example, the wrongful conduct could be fraudulent, defamatory, coercive, criminal, or a violation of a statute or regulation. This jury instruction does not incorporate all of those possibilities.

If the defendant claims the interference was justified, a sixth element should be added to the instruction. The language used can be identical to that used to cover justification in CIVJIG 40.30: "(Defendant's) actions were not justified."

AUTHORITIES

In *Gieseke ex rel. Diversified Water Diversion, Inc. v. IDCA, Inc.*, 844 N.W.2d 210, 217 (Minn. 2014), the Minnesota Supreme Court reaffirmed "that a cause of action for tortious interference with prospective economic advantage is a viable claim in Minnesota." The court held that to recover for tortious interference with prospective advantage a plaintiff must prove five elements:

1) The existence of a reasonable expectation of economic advantage;

2) Defendant's knowledge of that expectation of economic advantage;

3) That defendant intentionally interfered with plaintiff's reasonable expectation of economic advantage, and the intentional interference is either independently tortious or in violation of a state or federal statute or regulation;

4) That in the absence of the wrongful act of defendant, it is reasonably probable that plaintiff would have realized his economic advantage or benefit; and

5) That plaintiff sustained damages.

Id. at 219.

The torts of wrongful interference with contract and intentional interference with prospective economic advantage and protect different interests. Wrongful interference with contract protects " 'an interest in the security of contractual relationships,' while a cause of action for 'interference with business relationships protects an interest in the reasonable expectation of economic advantage.' " *Id.* at 218, *quoting Wild v. Rarig*, 302 Minn. 419, 442–43 & n. 16, 234 N.W.2d 775, 790–91 n. 16 (1975).

The court in *Gieseke* cited the Restatement (Second) of Torts § 767 (1979), "as a useful means for assessing the impact of the defendant's conduct, if any, on valid competition interests." 844 N.W.2d at 218 and n. 7. Section 767 reads as follows:

> In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors:
>
> (a) the nature of the actor's conduct,
>
> (b) the actor's motive,
>
> (c) the interests of the other with which the actor's conduct interferes,

(d) the interests sought to be advanced by the actor,

(e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,

(f) the proximity or remoteness of the actor's conduct to the interference and

(g) the relations between the parties.

However, the court noted that "examination of each of the seven factors may not be necessary in every case." *Id.*

The court's intent was to limit claims for tortious interference with prospective advantage claims "to those circumstances in which the interference is intentional and independently tortious or unlawful, rather than merely unfair." The Restatement guidelines are relevant in "assessing the impact of the defendant's conduct, if any, on valid competition interests." *Id.* Limiting the claims to cases where the defendant has engaged in "independently tortious or unlawful conduct adequately apprises potential defendants of the conduct that will subject them to liability, but ensures that businesses may rigorously compete with one another without fear of liability, as long as they do so lawfully." *Id.* at 219.

In a footnote, the court noted several cases with examples of the type of tortious or unlawful conduct that would support a claim for tortious interference with prospective economic advantage:

> *Speakers of Sport, Inc. v. ProServ, Inc.*, 178 F.3d 862, 867 (7th Cir.1999) (applying Illinois law and noting that Illinois courts require the defendant's conduct to involve actionable fraud or be otherwise independently tortious); *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 131 Cal.Rptr.2d 29, 63 P.3d 937, 954 (2003) (holding that an act is "independently wrongful if it is unlawful, that is if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard"); *Carvel Corp. v. Noonan*, 3 N.Y.3d 182, 785 N.Y.S.2d 359, 818 N.E.2d 1100, 1103 (2004) (stating that "as a general rule, the defendant's conduct must amount to a crime or an independent tort"); *Trade 'N Post, L.L.C. v. World Duty Free Ams., Inc.*, 628 N.W.2d 707, 721 (N.D.2001) (holding that a "plaintiff must establish that the interfering conduct was independently tortious or otherwise in violation of state law"); *Top Serv. Body Shop, Inc. v. Allstate Ins. Co.*, 283 Or. 201, 582 P.2d 1365, 1371 (1978) (defining "wrongful" to mean "wrongful by reason of a statute or other regulation, or a recognized rule of common law, or perhaps an established standard of a trade or profession").

Id. at 219 n. 8.

In *Moore v. Hoff*, 821 N.W.2d 591, 596–97 (Minn. Ct. App. 2012) and *Glass Service Co., Inc. v. State Farm Mutual Automobile Insurance Co.*, 530 N.W.2d 867, 871 (Minn. Ct. App. 1995), the Minnesota Court of Appeals held that a claim for intentional interference with prospective advantage cannot be based upon the communication of information that is "not false." In both cases the court relied on Restatement (Second) of Torts § 772 (1979), which reads as follows:

> One who intentionally causes a third person not to perform a contract or not to enter into a prospective contractual relation with another does not interfere improperly with the other's contractual relation, by giving the third person
>
> (a) truthful information, or
>
> (b) honest advice within the scope of a request for the advice.

Comment b to that section explains:

> There is of course no liability for interference with a contract or with a prospective contractual relation on the part of one who merely gives truthful information to another. The interference in this instance is clearly not improper. This is true even though the facts are marshaled in such a way that they speak for themselves and the person to whom the information is given immediately recognizes them as a reason for breaking his contract or refusing to deal with another. It is also true whether or not the information is requested. Compare § 581A, on the effect of truth in an action for defamation.

Id., cmt. b.

Research References

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CIVJIG 40.40

JUSTIFICATION

[The Committee recommends no instruction.]

USE NOTE

No specific instruction is recommended. Because of the variety of situations where justification may arise, and because of the difficulty in generalizing a justification instruction, the instruction should be tailored to the facts of the case.

AUTHORITIES

"Justification is the most common affirmative defense to an interference action. It is employed to denote the presence of exceptional circumstances which show that no tort was in fact committed and lawful excuse which excludes actual or legal malice." *Johnson v. Radde*, 293 Minn. 409, 411, 196 N.W.2d 478, 480 (1972). The Restatement (Second) of Torts § 768 (1979), which was adopted by the Minnesota Supreme Court in *United Wild Rice, Inc. v. Nelson*, 313 N.W.2d 628 (Minn. 1982), establishes basic standards for justification in intentional interference cases:

> (1) One who intentionally causes a third person not to enter into a prospective contractual relation with another who is his competitor or not to continue an existing contract terminable at will does not interfere improperly with the other's relation if
>
> (a) the relation concerns a matter involved in the competition between the actor and the other and
>
> (b) the actor does not employ wrongful means and
>
> (c) his action does not create or continue an unlawful restraint of trade and
>
> (d) his purpose is at least in part to advance his interest in competing with the other.
>
> (2) The fact that one is a competitor of another for the business of a third person does not prevent his causing a breach of an existing contract with the other from being an improper interference if the contract is not terminable at will.

United Wild Rice, 313 N.W.2d at 633 (*quoting* Restatement (Second) of Torts § 768 (1979)). The defendant has the burden of proving that interference was justified. *Kjesbo v. Ricks*, 517 N.W.2d 585, 588 (Minn. 1994); *Furlev Sales & Assocs., Inc. v. N. Am. Automotive Warehouse*, 325 N.W.2d 20, 25 (Minn. 1982); *Stephenson v. Plastics Corp. of Am.*, 276 Minn. 400, 416, 150 N.W.2d 668, 679–80 (1967); *Royal Realty Co. v. Levin*, 244 Minn. 288, 295, 69 N.W.2d 667, 673 (1955).

Justification is largely a question of fact for the jury; the general standard is "reasonable conduct under all the circumstances of the case." *Kjesbo v. Ricks*, 517 N.W.2d 585, 588 (Minn. 1994) (citing *Carnes v. St. Paul Union Stockyards Co.*, 164 Minn. 457, 463, 205 N.W. 630, 632 (1925)). "The court is not to look at the state of mind of the tortfeasor, but is to look to the actual, legal interest of the contract interfered with." *State of Minn. ex rel. Burlington N. R.R. v. Big Stone-Grant Indus. Development & Transp., L.L.C.*, 990 F. Supp. 731, 737 (D. Minn. 1997) (stating belief that a contract is invalid is not justification to interfere with that contract). For an overview of Minnesota's justification case law, *see Continental Research, Inc. v. Cruttenden, Podesta & Miller*, 222 F. Supp. 190, 207 (D. Minn. 1963).

1. Competition

First, in order to be justified in interfering with a contract, the defendant's actions must concern his competition with the plaintiff or another party. In an employment contract, for example, a third party that has dealings with an employer may be justified in interfering with a contract between the employer and its employee. *See Joyce v. Great N. Ry. Co.*, 100 Minn. 225, 233, 110 N.W. 975, 979 (1907) (finding that railway company may be justified in interfering with employment contract between depot and its employee). Similarly, a third party may have a right to interfere with an employment contract in order to protect its rights under a prior contract. *See Bennett v. Storz Broadcasting Co.*, 270 Minn. 525, 532, 134 N.W.2d 892, 897 (1965) ("[The] right of defendant to interfere with plaintiff's [contract] may be justified where the interference is made in good faith in an attempt to assert a legally protected interest which might be endangered or destroyed and under circumstances where the contract gives the employer a right which is equal or superior to the right of the employee . . . .").

In *Carnes v. St. Paul Union Stockyards Co.*, 164 Minn. 457, 205 N.W. 630 (1925), the defendant, a stockyard company, suspected the plaintiff of misconduct; the defendant accordingly refused to enter into contracts with any organization that employed the plaintiff. Although the Minnesota Supreme Court reversed a directed verdict and remanded for trial, it recognized the defendant's "legitimate interest" in the contract between the plaintiff and the depot:

> [B]ecause defendant had a legitimate interest to protect, in that it is the owner of the stockyards and responsible for their efficient management and proper use, . . . it has liberty of action much wider than that of a third party having no such interest or duty in the premises, and a discretion of management not lightly to be interfered with by the judiciary . . . .

Carnes, 164 Minn. at 464, 205 N.W. at 632. Thus, unlike an "officious intermeddler," the defendant "ha[d] rights which it may assert by excluding from its property a man of doubtful reputation, or one who had been guilty of misconduct in his dealings with defendant's patrons." *Id.*

2. Wrongful Means

Second, although "competition is favored in the law and may justify interference," the defendant must not employ wrongful means. *Schumacher v. Ihrke*, 469 N.W.2d 329, 334 (Minn. Ct. App. 1991). Minnesota courts have described "wrongful means" in many ways, including "malice," *Twitchell v. Nelson*, 131 Minn. 375, 381, 155 N.W. 621, 623 (1915), "bad faith," *Spice Corp. v. Foresight Mktg. Partners, Inc., Civ. No. 07-4767 JNE/JJG*, 2011 WL 6740333, at *19 (D. Minn. Dec. 22, 2011), and "ill will." *Heffernan v. Whittlsey*, 126 Minn. 163, 168, 148 N.W. 63, 65 (1914).

A defendant employs wrongful means when he interferes with a contract for the sole purpose of injuring the plaintiff. *See, e.g.*, *Tuttle v. Buck*, 107 Minn. 145, 151, 119 N.W. 946, 948 (1909) (finding interference unjustified where defendant opens barbershop "regardless of loss to himself, and for the sole purpose of driving his competitor out of business"). Defendant's actions may be wrongful, however, even without a desire to injure the plaintiff. As explained by the Minnesota Supreme Court:

> Merely to persuade a person to break his contract, may not be wrongful in law or fact. * * * But if the persuasion be used for the *indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff*, it is a malicious act, which is in law and in fact a wrong act, and therefore a wrongful act, and therefore an actionable act if injury ensues from it.

Johnson v. Gustafson, 201 Minn. 629, 634, 277 N.W. 252, 255 (1938); *see also Wolfson v. N. States Mgmt. Co.*, 210 Minn. 504, 508, 299 N.W. 676, 678 (1941) ("No action lies, however, for a conspiracy unless it be shown either that the end sought to be accomplished by the conspirators was unlawful or, if lawful, that the means resorted to for its accomplishment were harmful."). Under this reasoning, the property buyer in *Johnson v. Gustafson* was not justified in interfering with a contract between the homeowner and real estate agent when he conspired with the homeowner to circumvent the agent and avoid paying a commission. 201 Minn. at 634, 277 N.W. at 255.

In contrast, "[m]ere knowledge that a decision might affect other parties' contracts is not the same as intentional, unjustified interference." *Spice Corp. v. Foresight Mktg. Partners, Inc., Civ. No. 07-4767 JNE/JJG*, 2011 WL 6740333, at *19 (D. Minn. Dec. 22, 2011). In *Johnson v. Radde*, 293 Minn. 409, 196 N.W.2d 478 (1972), a homeowner and his real estate agent mistakenly entered into contracts with two different purchasers for the same property. The real estate agent was justified in interfering with the contract between the homeowner and the plaintiff because the agent had no desire to harm the plaintiff, and he would receive his commission regardless of who purchased the property. *Johnson v. Radde*, 293 Minn. at 411, 196 N.W.2d at 480.

3. Unlawful Business Restraint

Third, the defendant cannot create an unlawful restraint on the plaintiff's business. An act that creates a restraint in trade is not by itself unlawful. *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 233, 55 N.W. 1119, 1121 (1893). An unlawful restraint is one that "interfere[s] with, and injuriously affect[s], some of [the plaintiff's] legal rights." *Id.* In *Bohn Manufacturing Co. v. Hollis*, an association of retail lumber dealers agreed to boycott any manufacturers who sold directly to consumers, unless the manufacturer paid the association a 10% fine. The plaintiff was assessed this fine after selling to a consumer, and he sought an injunction against the association. The Minnesota Supreme Court found no unlawful business restraint: "It is perfectly lawful for any man . . . to refuse to work for or to deal with any man or class of men, as he sees fit." *Bohn*, 54 Minn. at 234, 55 N.W. at 1121. That the boycott was carried out by an organization rather than an individual was of no notice. *Id.* ("What one man may lawfully do singly, two or more may lawfully agree to do jointly.").

However, the court did not allow a boycott that "injure[s] or destroy[s] the business of another *for the purpose of compelling him not to work in such business himself*." *Roraback v. Motion Picture Mach. Operators' Union of Minneapolis*, 140 Minn. 481, 485, 168 N.W. 766, 767 (1918) (emphasis added); *see also Ertz v. Produce Exch. Co. of Minneapolis*, 79 Minn. 140, 143–45, 81 N.W. 737, 738–39 (1900). The touchstone is the lawfulness of the group action; an association may require certain behavior, but it must do so for legitimate business purposes.

4. Advancing Business Interests

Finally, the defendant's purpose in interfering with the contract must be at least in part to advance his own business interests. "There is no wrongful interference with a contract where one asserts 'in good faith a legally protected interest of his own . . . believ[ing] that his interest may otherwise be impaired or destroyed by the performance of the contract or transaction.' " *Kjesbo v. Ricks*, 517 N.W.2d 585, 588 (Minn. 1994) (alteration in original) (*citing* Restatement (Second) of Contracts § 773). Specifically, the defendant's interests must be "equal or superior" to the plaintiff's right to carry out (or enter into) the contract. *Bennett v. Storz Broadcasting Co.*, 270 Minn. 525, 533, 134 N.W.2d 892, 898 (1965). In *Bennett v Storz Broadcasting Co.*, the plaintiff was a radio announcer for the defendant radio station. A restrictive covenant precluded the plaintiff from accepting employment with another radio station for 18 months after termination of employment. When the plaintiff sought employment with another station, the defendant threatened to sue the station. The trial court granted summary judgment to the defendant. The supreme court reversed, stating that the record "d[id] not establish as a matter of law . . . that the economic interest of the [defendant] would in any way be affected by the employment of plaintiff by another radio station." *Id.* at 536, 134 N.W.2d at 900.

In *United Wild Rice v. Nelson*, 313 N.W.2d 628 (Minn. 1982), in contrast, the supreme court determined that the defendant, a former employee of the plaintiff, was justified in competing with the defendant because he sought to advance his own interests and the interests of his new employer. *United Wild Rice*, 313 N.W.2d at 633. Specifically, the court found that the defendant's "motives were mixed; he desired to improve his own position but also to worsen that of United." *Id.*

Research References

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CIVJIG 40.45

INTERFERENCE WITH CONTRACTUAL RELATIONSHIPS—DAMAGES

Damages for interference with a contractual relationship

Damages for interference with a contractual relationship may include:

1. The loss of benefits of the contract, and
2. Other losses that were directly caused by the interference, and
3. Emotional distress or actual harm to reputation, if the distress or harm can reasonably be expected to result from the interference.

USE NOTE

This is the damages instructions for cases involving interference with contractual relations. Damages include not only pecuniary loss and consequential damages. Damages may also include emotional distress or actual harm to reputation, if emotional distress or harm to reputation can reasonably be expected to result from the interference.

AUTHORITIES

In *Potthoff v. Jefferson Lines, Inc.*, 363 N.W.2d 771, 777 (Minn. Ct. App. 1985), the court of appeals approved trial court instructions on damages drawn from the Restatement (Second) of Torts § 774A, which reads as follows:

> (1) One who is liable to another for interference with a contract or prospective contractual relation is liable for damages for
>
> (a) the pecuniary loss of the benefits of the contract or the prospective relation.
>
> (b) consequential losses for which the interference is a legal cause; and
>
> (c) emotional distress or actual harm to reputation, if they are reasonably to be expected to result from the interference.

Restatement (Second) of Torts § 744A (1979).

The court of appeals held that damages for emotional distress could be a natural result of the interference and could therefore be recovered. *Potthoff*, 363 N.W.2d at 777.

The second part of the Restatement reads as follows:

> (2) In an action for interference with a contract by inducing or causing a third person to break the contract with the other, the fact that the third person is liable for the breach does not affect the amount of damages awardable against the actor; but any damages in fact paid by the third person will reduce the damages actually recoverable on the judgment.

Restatement (Second) of Torts § 744A (1979).

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CATEGORY 45

CIVIL DAMAGE ACT

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INTRODUCTORY NOTE

The Civil Damage Act

The Civil Damage Act, M.S.A. § 340A.801, reads as follows:

> **Subdivision 1. Right of action.** A spouse, child, parent, guardian, employer, or other person injured in person, property, or means of support, or who incurs other pecuniary loss by an intoxicated person or by the intoxication of another person, has a right of action in the person's own name for all damages sustained against a person who caused the intoxication of that person by illegally selling alcoholic beverages. All damages recovered by a minor under this section must be paid either to the minor or to the minor's parent, guardian, or next friend as the court directs.
>
> **Subd. 2. Actions.** All suits for damages under this section must be by civil action in a court of this state having jurisdiction.
>
> **Subd. 3. Comparative negligence.** Actions under this section are governed by section 604.01.
>
> **Subd. 3a. Defense.** The defense described in section 340A.503, subdivision 6, applies to actions under this section.
>
> **Subd. 4. Subrogation claims denied.** There shall be no recovery by any insurance company against any liquor vendor under subrogation clauses of the uninsured, underinsured, collision, or other first party coverages of a motor vehicle insurance policy as a result of payments made by the company to persons who have claims that arise in whole or part under this section. The provisions of section 65B.53, subdivision 3, do not apply to actions under this section.
>
> **Subd. 6. Common law claims.** Nothing in this chapter precludes common law tort claims against any person 21 years old or older who knowingly provides or furnishes alcoholic beverages to a person under the age of 21 years.

Subdivision 5 of the Act has been repealed.

The defense provided for in subdivision 3a, based on section 340A.503, subd. 6, reads as follows:

> **Subd. 6.** (a) Proof of age for purchasing or consuming alcoholic beverages may be established only by one of the following:
>
> (1) a valid driver's license or identification card issued by Minnesota, another state, or a province of Canada, and including the photograph and date of birth of the licensed person;
>
> (2) a valid military identification card issued by the United States Department of Defense; or
>
> (3) in the case of a foreign national, from a nation other than Canada, by a valid passport.
>
> (b) In a prosecution under subdivision 2, clause (1), it is a defense

for the defendant to prove by a preponderance of the evidence that the defendant reasonably and in good faith relied upon representations of proof of age authorized in paragraph (a) in selling, bartering, furnishing, or giving the alcoholic beverage.

Elements of a Civil Damage Act Claim

There are three basic elements in a Civil Damage Act claim:

1. That the defendant illegally sold an alcoholic beverage. *See Cady v. Coleman*, 315 N.W.2d 593, 596 (Minn. 1982); *Hartwig v. Loyal Order of Moose*, 253 Minn. 347, 356, 91 N.W.2d 794, 801 (1958); *Strand v. Village of Watson*, 245 Minn. 414, 420, 72 N.W.2d 609, 614 (1955). *See generally Seeley v. Sobczak*, 281 N.W.2d 368 (Minn. 1979). Note that the 1985 amendments deleted the word "barter" from the Act. *See* Act of June 5, 1985, ch. 305, art. 10, § 1, subd. 1, 1985 Minn. Laws 1499. Recovery under the Civil Damage Act is not dependent upon a finding of negligence. *See Hahn v. Ortonville*, 238 Minn. 428, 433, 57 N.W.2d 254, 259 (1953).

2. That the alcoholic beverage illegally sold or bartered by the defendant was either the sole, or the cooperating, concurring, or contributing cause of the intoxicated person's intoxication. *See Hollerich v. Good Thunder*, 340 N.W.2d 665, 668 (Minn. 1983); *Murphy v. Hennen*, 264 Minn. 457, 463, 119 N.W.2d 489, 493 (1963); *Hahn v. Ortonville*, 238 Minn. 428, 432, 57 N.W.2d 254, 258–259 (1953). The sale need not have been the sole cause of intoxication. It is sufficient if the sale was a "proximately contributing cause." *Kryzer v. Champlin American Legion No. 600*, 494 N.W.2d 35, 36–37 (Minn. 1992). There must be a "practical and substantial relationship" between the illegal sale and intoxication in order to establish the necessary causal relationship. *Hollerich v. Good Thunder*, 340 N.W.2d 665, 668 (Minn. 1983); *Kvanli v. Watson*, 272 Minn. 481, 484, 139 N.W.2d 275, 277 (1965).

3. That the intoxication was a direct (proximate) cause of the plaintiff's injuries. *See Hollerich v. Good Thunder*, 340 N.W.2d 665, 668 (Minn. 1983); *Hartwig v. Loyal Order of Moose*, 253 Minn. 347, 356, 91 N.W.2d 794, 801 (1958); *Adamson v. Dougherty*, 248 Minn. 535, 542, 81 N.W.2d 110, 115 (1957); *Strand v. Watson*, 245 Minn. 414, 420, 72 N.W.2d 609, 614 (1955).

Persons Subject to Liability

Only commercial vendors of alcohol are subject to liability under the Civil Damage Act, a conclusion the supreme court reached after an interesting interplay between the legislature and the court. As the court has created potential exceptions to that rule, the legislature has responded by eliminating the exceptions.

In *Ross v. Ross*, 294 Minn. 115, 200 N.W.2d 149 (1972), the supreme court held that the Civil Damage Act applied to social hosts. *Ross v. Ross*, 294 Minn. at 121, 200 N.W.2d at 153. In 1977, however, the legislature deleted the word "giving" from the act, precluding social host liability. The supreme court subsequently held that the legislature's intent to restrict liability only to commercial vendors is sufficiently clear from the deletion of the word "giving" from the act. The words "Any person" who sells or barters liquor means "a person in the business of providing liquor, and not a social host who happens to receive some consideration from his guests in return for drinks he provides." *Cady v. Coleman*, 315 N.W.2d 593, 596 (Minn. 1982).

In *Walker v. Kennedy*, 338 N.W.2d 254 (Minn. 1983), the supreme court adhered to *Cady*, but left open the issue of whether a social host could be held liable when the guest is a minor. Subsequently, in *Holmquist v. Miller*, 367 N.W.2d 468 (Minn. 1985), the court held that the Civil Damage Act preempts a cause of action against a social host for negligently serving alcohol, whether to a minor or adult. The court also held that the Civil Damage Act does not include liability against an employer for furnishing alcohol to an employee. *See Meany v. Newell*, 367 N.W.2d 472 (Minn. 1985).

Prior to a 1982 amendment, the Civil Damage Act did not apply to sales of non-intoxicating malt liquor, although a common law negligence action was allowed in such cases. *See Jones v. Fisher*, 309 N.W.2d 726, 728 (Minn. 1981); *Trail v. Christian*, 298 Minn. 101, 111–12, 213 N.W.2d 618, 624 (1973). The Civil Damage Act now covers non-intoxicating malt liquor, currently defined as "3.2 percent malt liquor," M.S.A. § 340A.101, subd. 19, which falls under the definition of alcoholic beverage in M.S.A. § 340A.101, subd. 2.

As it is currently interpreted, the Act permits actions only against commercial vendors or persons in the business of providing liquor, *e.g., Koehnen v. Dufuor*, 590 N.W.2d 107, 111–12 (Minn. 1999); *Urban v. American Legion Post 184*, 695 N.W.2d 153, 159 (Minn. Ct. App. 2005), rev. granted (Minn. July 19, 2005). The line between a commercial vendor and social host is not crossed simply because a social host provides alcohol for consideration.

In *Urban v. American Legion Dep't of Minnesota*, 723 N.W.2d 1 (Minn. 2006), a Civil Damage Act case arising out of serious injuries and death caused by an intoxicated driver allegedly served alcohol illegally by an American Legion Post, the issue was whether the American Legion Department of Minnesota and/or the American Legion National were vicariously liable under the Act.

The supreme court had previously applied respondeat superior in *Hahn v. City of Ortonville*, 238 Minn. 428, 57 N.W.2d 254 (1953), by holding a municipality liable for the bartenders' actions, but in 1985, the legislature amended the Act to provide that "[e]very licensee is responsible for the conduct in the licensed establishment and any sale of alcoholic beverage by any employee authorized to sell alcoholic beverages in the establishment is the act of the licensee for the purposes of all provisions of this chapter . . . ." The court in *Urban* held that the amendment indicated a legislative intent to limit vicarious liability to licensees who are responsible for the actions of their employees, because the statute "necessarily implies that the legislature did not expect respondeat superior to apply to CDA liability." *Urban*, 723 N.W.2d at 5.

Illegal Sale

The Act requires proof that a commercial vendor of alcohol illegally sold alcohol and that the sale caused the intoxication of another person. To determine what constitutes an "illegal sale" within the meaning of the Civil Damage Act, M.S.A. § 340A.801, must be read together with M.S.A. §§ 340A.502, 340A.503 and 340A.504. Sale of alcoholic beverages to a person who is "obviously intoxicated" is prohibited. *See* M.S.A. § 340A.502; *Johnson v. Moberg*, 334 N.W.2d 411, 414 (Minn. 1983), appeal after remand, 354 N.W.2d 613 (1984); *Seeley v. Sobczak*, 281 N.W.2d 368, 370–371 (Minn. 1979).

The term "sale" is not defined in the Act. In *Knese v. Heidgerken*, 358 N.W.2d 177, 179–80 (Minn. Ct. App. 1984), the court of appeals held that a sale of alcohol requires a bargained-for exchange—consideration, in order for liability to be imposed on a commercial vendor of alcohol, and that no sale occurred in a case where a minor entered a bar door that had been mistakenly left open when the bar was closed and took beer from the bar. The court noted that even had the plaintiff left money to pay for the beer there would have been no change to bargain or agree to the exchange. *Knese v. Heidgerken*, 358 N.W.2d at 180. The issue could raise a fact question for the trier of fact. *See Husbands v. City of Baudette*, 2003 WL 22952754, at *4 (Minn. Ct. App. Dec. 16, 2004) (intoxicated person may have received drinks in consideration for cleaning a bar).

Persons Entitled to Recover under the Civil Damage Act—Standing

The Act creates a cause of action for a "spouse, child, parent, guardian, employer, or other person injured in person, property, or means of support, or who incurs other pecuniary loss by an intoxicated person or by the intoxication of another person" caused by the illegal sale of alcoholic beverages. The Civil Damage Act does not create a cause of action in favor of one injured by his own intoxication. *Herrly v. Muzik*, 374 N.W.2d 275, 278 (Minn. 1985); *Randall v. Excelsior*, 258 Minn. 81, 83, 103 N.W.2d 131, 133 (1960).

In *Lefto v. Hoggsbreath Enterprises, Inc.*, 581 N.W.2d 855, 857 (Minn. 1998), the supreme court, *citing Herrly*, noted that that "[o]ur repeated view [is] that the [Act] was intended solely to protect 'innocent third persons' injured as a result of another's intoxication * * * ," and that "consistent with our previous construction of the term 'other person,' we conclude that the term "other person" refers to *any* other person injured by the intoxication of another and who played no role in causing the intoxication." *Lefto v. Hoggsbreath Enterprises, Inc.*, 581 N.W.2d at 857 (footnotes omitted).

The court in *Lefto* specifically rejected the theory that "only people with a legal relationship with the intoxicated person are entitled to recover." *Lefto v. Hoggsbreath Enterprises, Inc.*, 581 N.W.2d at 856. The plaintiff in the case brought suit on her own and on behalf of her and her daughter for loss of means of support due to serious injuries sustained by her fiancé was seriously injured on their wedding day. The plaintiff and her daughter lived with and were economically dependent on him. The court held that they fit the definition of "other person" under the Act. Id. at 857. In *Skelly v. Mount*, 620 N.W.2d 566 (Minn. Ct. App. 2000), rev. denied (Minn. Feb. 21, 2001), the court of appeals, following *Lefto*, held that a woman whose ex-husband was killed in a one-car crash, and who was economically dependent on him, qualified as an "other person" under the Act.

In *K.R. v. Sanford*, 605 N.W.2d 387 (Minn. 2000), the supreme court clarified the meaning of the term "innocent third party." The court first noted that the complicity issue was not presented in *Lefto*, before holding that its construction of the term "innocent third party" in that case was overbroad. The court then clarified the meaning of the term:

> [T]he term "innocent third party," as used in our case law interpreting the complicity doctrine under the Damages Act, means a party not complicit in the specific illegal act. The term "innocent" as used in the term "innocent third party" does not refer to generic innocence in the sense of not providing alcohol to one who ultimately causes damage. Just as a liquor vendor is held responsible for those specific acts made illegal by the legislature, so also, a party is held responsible for complicity in specific illegal acts.

K.R. v. Sanford, 605 N.W.2d at 393–94 (footnote omitted). Therefore, a person who participated in the intoxication of another person will not be barred from bringing an action under the Civil Damage Act. If a person is complicit in the intoxication of another person in the sense of knowingly and affirmatively participating in the illegal sale of alcohol to that person, the complicit person is covered under the holding of *K.R. v. Sanford*, which acknowledges that complicity is not a complete defense, but rather a type of fault subject to comparison under the Comparative Fault Act.

There are certain categories of persons who will not have standing to sue under the Civil Damage Act:

1. Voluntarily intoxicated persons. *Herrly v. Muzik*, 374 N.W.2d 275, 278 (Minn. 1985); *Randall v. Excelsior*, 258 Minn. 81, 83, 103 N.W.2d 131, 133 (1960).

2. On-duty police officers. An on-duty police officer is not an

"other person." *Hannah v. Jensen*, 298 N.W.2d 52, 54–55 (Minn. 1980) (on-duty police officer does not qualify as "other person," due to application of firefighter's rule; firefighter's rule abolished by M.S.A. § 604.06, which states that the rule may not operate to deny "recovery in any action at law or authorized by statute").

3. Insurers making payments because of injury to a voluntarily intoxicated person. *Empire Fire & Marine Ins. Co. v. Williams*, 265 Minn. 333, 337, 121 N.W.2d 580, 583 (1963) (tortfeasor's insurance company does not qualify as "other person," due to application of subrogation principle); *Sather v. Woodland Liquors, Inc.*, 597 N.W.2d 295, 299 (Minn. Ct. App. 1999) ("other person" does not include the Minnesota Department of Human Services, which provided medical assistance to an injured person to whom defendant illegally sold alcohol); *Line Construction Benefit Fund v. Skeates*, 563 N.W.2d 757 (Minn. Ct. App. 1997) (health and medical benefits insurer that provided benefits for voluntarily intoxicated person is not an "other person" within meaning of Civil Damage Act).

Recoverable Damages

The Act provides that damages may be awarded to "[a] spouse, child, parent, guardian, employer, or other person injured in person, property, or means of support, or who incurs other pecuniary loss." M.S.A. § 340A.801, subd. 1. "Means of support" refers to the standard of living to which a person is accustomed and the source through which that standard is maintained. M.S.A. § 340A.801, subd. 1 applies when there is a loss or reduction of the means of providing the accustomed support. *See Paine v. Water Works Supply Co.*, 269 N.W.2d 725, 731 (Minn. 1978); *Herbes v. Holdingford*, 267 Minn. 75, 84, 125 N.W.2d 426, 432 (1963); *Bundy v. Fridley*, 265 Minn. 549, 553, 122 N.W.2d 585, 588–589 (1963); *State Farm Mut. Auto. Ins. Co. v. Isle*, 265 Minn. 360, 366, 122 N.W.2d 36, 40–41 (1963). While the Act does not define "means of support," the term incorporates a requirement that the person seeking recovery for loss of support be a dependent. *Britamco Underwriters, Inc. v. A & A Liquors of St. Cloud*, 649 N.W.2d 867, 872 (Minn. Ct. App. 2002). A person who is injured by an intoxicated person has a claim for bodily injury that includes the usual damages available in personal injury actions, but does not have a claim for loss of support separate and apart from the bodily injury claim. *Britamco Underwriters, Inc. v. A & A Liquors of St. Cloud*, 649 N.W.2d 867, 872 (Minn. Ct. App. 2002). Also, lost profits of a corporation may not be recovered by shareholders and their dependents as damages for loss of support under the Act. *Johnson v. Foundry, Inc.*, 702 N.W.2d 274, 277–78 (Minn. Ct. App. 2005).

In *Lefto v. Hoggsbreath Enterprises, Inc.*, 581 N.W.2d 855 (Minn. 1998), the supreme court held that the term "other person" in the Act means "any other person injured by the intoxication of another and who played no role in causing the intoxication," 581 N.W.2d at 857. Responding to criticism by the dissenting opinion that damages would not be subject to containment, the court suggested that there are still limitations on the right to recover damages:

> We do not believe the legislature intended to include every conceivable remote injury. In order to recover under the Act, a party seeking recovery must establish that they are "injured * * * by an intoxicated person or by the intoxication of another person * * * ." While the statute has no counterpart in the common law, presumably, in order to recover, the party seeking recovery will have to establish that his or her injury was reasonably foreseeable and proximately caused by the intoxicated person.

581 N.W.2d at 857 n.9.

The Act also provides for the recovery of damages for pecuniary loss. In *Coolidge v. St. Paul Fire and Marine Ins. Co.*, 523 N.W.2d 5 (Minn. Ct. App. 1994), rev. granted (Minn. Dec. 21, 1994), appeal dismissed (Minn. Jan. 6, 1995), held that the right to recover for pecuniary loss is not limited to death cases. The right to recover for pecuniary loss, however, is not limited to cases in which loss of consortium claims are permitted. The court of appeals in *Lefto v. Hoggsbreath Enterprises, Inc.*, 567 N.W.2d 746, 750 (Minn. Ct. App. 1997), aff'd, 581 N.W.2d 855 (Minn. 1998), noted the differences between loss of consortium and pecuniary loss claims:

> The *Coolidge* court did not, however, define pecuniary loss as co-extensive with loss of consortium. Moreover, consortium is the "reciprocal rights inherent *in the marital relationship of husband and wife*, including such undefined elements as comfort, companionship, and commitment to the needs of each other." *Thill v. Modern Erecting Co.*, 284 Minn. 508, 510, 170 N.W.2d 865, 867–68 (1969) (emphasis added). Pecuniary loss, in contrast, is defined more broadly, and encompasses the loss of aid, advice, comfort, and protection that a person would have provided but for the person's injury regardless of whether a marital relationship exists. *Coolidge*, 523 N.W.2d 5, 6 (citing *Cummins v. Rachner*, 257 N.W.2d 808, 815 (Minn. 1977)).
>
> "Loss of consortium" thus applies, by definition, only to loss suffered by married persons. As a result, it cannot apply, as pecuniary loss may, to the loss of aid, advice, comfort, and protection suffered by a child when a man who has taken her into his home has sustained permanent brain damage. Nor does it apply to the loss of aid, advice, comfort, and protection suffered by a woman when her fiancé has suffered such injuries. Pecuniary loss is not "co-extensive" with loss for consortium, and the rule prohibiting recovery for loss of consortium by a non-spouse does not bar Lefto's and her daughter's recovery of pecuniary loss under the Act.

The right to recover for pecuniary loss, therefore, is not subject to the limitations the court has imposed on the right to recover for loss of consortium. *See Salin v. Kloempken*, 322 N.W.2d 736, 740 (Minn. 1982) (children are not entitled to recover for loss of parental consortium). The court of appeals reaffirmed *Coolidge* in an unpublished opinion, *DeSanti v. Youngs*, 2003 WL 139393, at *7 (Minn. Ct. App. Jan. 21, 2003), reh. denied (Minn. Ct. App. April 15, 2003).

Comparative Fault and Complicity

Comparative fault principles apply to Civil Damage Act claims. M.S.A. § 340A.801, subd. 3. The fault of an intoxicated person is not imputed to family members seeking damages for loss of means of support, however. *Paulson v. Lapa*, 450 N.W.2d 374, 380 (Minn. Ct. App. 1990), rev. denied (Minn. March 22, 1990). Comparative fault applies to the limited social host claims permitted by M.S.A. § 340A.801, subd. 6, even where the claim is brought by an injured person under the age of 21 who brings suit against the social host. *Van Wagner v. Mattison*, 533 N.W.2d 75, 80 (Minn. Ct. App. 1995), rev. denied (Minn. Sept. 19, 1999).

The defense of complicity, which previously was a complete defense to Civil Damage Act claims by an injured person, is now part of the definition of fault under M.S.A. § 604.01, subd. 1a, and, accordingly, subject to comparison under the Comparative Fault Act. In *K.R. v. Sanford*, 605 N.W.2d 387 (Minn. 2000), the Minnesota Supreme Court held that a plaintiff's complicity in the illegal sale of alcohol is not a bar to recovery by the plaintiff for damages under the Civil Damage Act, but that it is a defense subject to comparison under the comparative fault act, M.S.A. § 604.01, subd. 1a. The court defined complicity as participating knowingly and affirmatively in the illegal sale that contributed to the intoxication. 605 N.W.2d at 391, citing *Turk v. Long Branch Saloon, Inc.*, 280 Minn. 438, 442, 159 N.W.2d 903, 906 (1968).

Social Host Liability

Social hosts are ordinarily not subject to liability under the Civil Damage Act, even if a social host's sale of alcohol contributes to the intoxication of a person. *Koehnen v. Dufuor*, 590 N.W.2d 107, 112–13 (Minn. 1999). There is a limited exception in M.S.A. § 340A.801, subd. 6, which provides as follows:

> Nothing in this chapter precludes common law tort claims against any person 21 years old or older who knowingly provides or furnishes alcoholic beverages to a person under the age of 21 years.

There are no Minnesota Supreme Court opinions construing this provision.

The legislature has also created a limited form of social host liability in M.S.A. § 340A.90 that parallels the social host liability permitted by M.S.A. § 340A.801, subd. 6, although there are important differences. Section 340A.90 reads as follows:

> **Subdivision 1.** (a) A spouse, child, parent, guardian, employer, or

other person injured in person, property, or means of support, or who incurs other pecuniary loss, by an intoxicated person under 21 years of age or by the intoxication of another person under 21 years of age, has for all damages sustained a right of action in the person's own name against a person who is 21 years or older who:

> (1) had control over the premises and, being in a reasonable position to prevent the consumption of alcoholic beverages by that person, knowingly or recklessly permitted that consumption and the consumption caused the intoxication of that person; or
>
> (2) sold, bartered, furnished or gave to, or purchased for a person under the age of 21 years alcoholic beverages that caused the intoxication of that person.

This paragraph does not apply to sales licensed under this chapter.

(b) All damages recovered by a minor under this section must be paid either to the minor or to the minor's parent, guardian, or next friend as the court directs.

(c) An intoxicated person under the age of 21 years who caused the injury has no right of action under this section.

Subd. 2. There shall be no recovery by any insurance company for any subrogation claim pursuant to any subrogation clause of the uninsured, underinsured, collision, or other first-party coverages of a motor vehicle insurance policy as a result of payments made by the company to persons who have claims that arise in whole or in part under this section.

Subd. 3. (a) There shall be no coverage for liability created under this section under homeowner's insurance as defined under section 65A.27, unless:

> (1) specifically covered in a policy; or
>
> (2) covered by a rider attached to a policy.

(b) This subdivision expires on December 31, 2001.

The relationship between the cause of action created by M.S.A. § 340A.90, and the social host action permitted by M.S.A. § 340A.801, subd. 6, is not entirely clear. M.S.A. § 340A.90 does not repeal M.S.A. § 340A.801, subd. 6, so both actions are presumably permitted. The major difference between the potential claims is that actions by the person under age 21 are permitted under M.S.A. § 340A.801, subd. 6, *see VanWagner v. Mattison*, 533 N.W.2d 75 (Minn. Ct. App. 1995), rev. denied (Minn. Sept. 20, 1995), but apparently not under the new statute.

M.S.A. § 340A.90, subd. 1(c), which specifically states that "[a]n intoxicated person under the age of 21 years who caused the injury has no right of action under t his section."

The following table summarizes the principal differences between the social host liability claims.

	M.S.A. § 340A.90	**M.S.A. § 340A.801, subd. 6**
Persons entitled to recover	Spouse, child, parent, guardian, employer, or other person injured in person, property, or means of support, or who incurs other pecuniary loss. Subd. 1(a).	Third persons
	Intoxicated person under 21 not entitled to recover. Subd. 1(c).	Persons under 21
Damages	Injury in person, property, or means of support, or who incurs other pecuniary loss. Subd. 1(a).	Personal injury—past and future medical expenses, wage loss, and pain and suffering
Comparative fault and contributory negligence	Statute is silent (compare § 340A.801, subd. 2). See *Paulson v. Lapa*, 450 N.W.2d 374, 380 (Minn. Ct. App. 1990), rev. denied (Minn. March 22, 1990).	§ 604.01 applies; contributory negligence of person under 21 is a defense: *VanWagner v. Mattison*, 533 N.W.2d 75 (Minn. Ct. App. 1995), rev. denied (Minn. Sept. 20, 1995).
Required proof	Person over 21 controlled premises, was in reasonable position to prevent intoxication, and knowingly or recklessly permitted consumption of alcohol by person under 21, or sold, bartered, furnished or gave to, or purchased alcohol for a person under the age of 21	Person over 21 knowingly provided or furnished alcoholic beverages to a person under 21, plus negligence (including negligence *per se* for violating M.S.A. § 340A.503, subd. 2(1))

For a discussion of M.S.A. § 340A.90, *see* CIVJIG 45.62. For a special verdict form covering the elements of liability under the statute, *see* CIVSVF 45.92.

CIVJIG 45.10

ILLEGAL SALE—GENERAL

Illegal sale of alcohol

> Minnesota law says that no alcoholic beverage can be sold for any purpose to any person who (specify type of illegal sale).
>
> A violation of this law is an illegal sale.

USE NOTE

There are several types of illegal sales that are covered by the Civil Damage Act. The instruction would be modified to include the type of sale in issue. For example, if the defendant sold an alcoholic beverage to a person under the age of 21 years, the instruction would state that "Minnesota law says that no alcoholic beverage can be sold for any purpose to any person who is under the age of 21 years."

If the plaintiff's theory is that the illegal sale was to an obviously intoxicated person, CIVJIG 45.15 should be used.

AUTHORITIES

The supreme court has found illegal sales in a variety of cases, including:

(1) liquor sales by clubs to non-members or guests;

(2) sales during prohibited hours;

(3) sales to persons under 21;

(4) sales to obviously intoxicated persons; and

(5) sales on prohibited days.

See Rambaum v. Swisher, 435 N.W.2d 19, 22 (Minn. 1989) (non-members or guests of club); *Hollerich v. City of Good Thunder*, 340 N.W.2d 665, 669 (Minn. 1983) (after-hours); *Kvanli v. Village of Watson*, 272 Minn. 481, 484, 139 N.W.2d 275, 278 (1965) (persons under 21); *Strand v. Village of Watson*, 245 Minn. 414, 419–20, 72 N.W.2d 609, 614 (1955) (intoxicated persons); *Fest v. Olson*, 138 Minn. 31, 33, 163 N.W. 798, 798 (1917) (Sunday sales, when prohibited by statute.).

In *Hollerich*, the court held that an after-hours sale of intoxicating liquor in violation of M.S.A. § 340.14, subd. 1 (now § 340A.504, subd. 1), was an "illegal sale" for purposes of the Civil Damage Act. 340 N.W.2d at 668. The sale may be illegal because of the person to whom intoxicating liquor is sold (an obviously intoxicated person, minor, or other prohibited persons, *see* M.S.A. § 340.14, subd. 1a), or because the sale violates other provisions, such as M.S.A. § 340.14, subd. 1, prohibiting after-hours sales. In *Hollerich*, the court stated that:

> Only the issue of after-hour sales is presented and decided here. We do not, for example, reach the question of whether a violation of the geographical restrictions of subdivision 2 of section 340.14 or any of the sections concerning licensing, bonding and taxation would constitute an "illegal sale." Chapter 340 contains a variety of prohibitions, each in its own context, each with its own purpose and legislative history. Whether a dramshop action exists for other "illegal sales" would require consideration by us in the concrete setting of an actual case.

340 N.W.2d at 669.

Hollerich dealt only with the question of whether an after-hours sale was wrongful. Whether the illegal sale contributed to a person's intoxication is a separate question not considered by the court and is a different obstacle for the plaintiffs to overcome. However, the court briefly discussed the problem in a footnote:

> It can be argued that what makes an after-hours sale "illegal" for dramshop purposes is not so much the violation of section 340.14, subd. 1, but "a practical and substantial relationship between (a) the circumstances making the sale illegal, and (b) the circumstances accounting for the consumption of the liquor by the one whose intoxication caused damage." *Kvanli v. Village of Watson,* 272 Minn. 481, 139 N.W.2d 275, 277 (1965) (where pertinent circumstances included what the bartender knew or should have known about who would consume the purchased liquor and the time lapse between the illegal sale and consumption). It seems to us, however, that in defining "illegal sale" for dramshop purposes, it makes for clearer analysis to discuss the circumstances surrounding the sale and consumption as bearing on the causation factor rather than on "illegality."

340 N.W.2d at 669 n. 2.

The term "sale" is not defined in the Act. In *Knese v. Heidgerken*, 358 N.W.2d 177, 179–80 (Minn. Ct. App. 1984), the court of appeals held that a sale of alcohol requires a bargained-for exchange—consideration, in order for liability to be imposed on a commercial vendor of alcohol, and that no sale occurred in a case where a minor entered a bar door that had been mistakenly left open when the bar was closed and took beer from the bar. The court noted that even had the plaintiff left money to pay for the beer there would have been no change to bargain or agree to the exchange. *Knese v. Heidgerken*, 358 N.W.2d at 180. The issue could raise a fact question for the trier of fact. *See Husbands v. City of Baudette*, 2003 WL 22952754, at *4 (Minn. Ct. App. Dec. 16, 2004) (intoxicated person may have received drinks in consideration for cleaning a bar).

In *Carlson v. Thompson*, 615 N.W.2d 387 (Minn. Ct. App. 2000), rev. denied (Minn. Oct. 17, 2000), the defendant Firefighters Relief Association, which had obtained a license to sell non-intoxicating liquor to the public, charged another defendant an admission fee, sold beer tickets to him, a few of which he used, and then provided him with alcoholic beverages later when he was obviously intoxicated, even though he did not use the tickets at that point. The issue was whether a "sale" of alcohol occurred when he was provided the alcohol, although not through the exchange of the beer tickets, which he had given away to someone else. The court concluded that he was a paying customer because he paid admission charges and bought beer tickets, and "was in that sense a paying customer who anticipated the serving of beer for his payment." The court noted that the transaction occurred in the ordinary course of the commercial vendor's business, "enlarging its prospect for profits in the serving of drinks." *Carlson v. Thompson*, 615 N.W.2d at 389. Therefore, the court held that a sale occurred. The court's rationale emphasized the need to "avoid a hypertechnical determination of whether a sale was consummated or intended":

> Such an approach, among other things, permits practices designed to frustrate application of the act. We account for the fundamental purpose of the act to uphold liability in respect to people engaged in a business, making a profit in the provision of liquor . . . . Although the Act is not to be construed "beyond its definite scope," it is to be liberally construed to the ends of suppressing the illegal furnishing of liquor that causes a person's intoxication and providing compensation for those who are injured as a result of this conduct.

Carlson v. Thompson, 615 N.W.2d at 389.

Research References

West's Key Number Digest
Intoxicating Liquors ⚷286, 317

Legal Encyclopedias
C.J.S., Intoxicating Liquors §§ 642 to 647, 649 to 651, 682, 684

CIVJIG 45.15

ILLEGAL SALE

Sale to an obviously intoxicated person

Minnesota law says that it is illegal to sell an alcoholic beverage for any purpose to any person who is at the time "obviously intoxicated."

A violation of this law is an illegal sale.

Definition of "obviously intoxicated"

A person is "obviously intoxicated", if the intoxication is or should be reasonably evident to another person using usual powers of observation.

If (defendant) sold an alcoholic beverage to (intoxicated person) at a time when (intoxicated person) was obviously intoxicated, (defendant) made an illegal sale.

USE NOTE

There are several ways in which an illegal sale may be made. This instruction applies to cases where the claim is that the person to whom alcohol was served was "obviously intoxicated." It should be given in conjunction with CIVJIG 45.25, which defines "intoxicated."

AUTHORITIES

To determine what constitutes an "illegal sale" within the meaning of the Civil Damage Act, M.S.A. § 340A.801, must be read together with M.S.A. §§ 340A.502, 340A.503 and 340A.504. Sale of alcoholic beverages to a person who is "obviously intoxicated" is prohibited. *See* M.S.A. § 340A.502; *Johnson v. Moberg*, 334 N.W.2d 411, 414 (Minn. 1983), appeal after remand 354 N.W.2d 613 (1984); *Seeley v. Sobczak*, 281 N.W.2d 368, 370–371 (Minn. 1979).

The standard for determining whether a person is "obviously intoxicated" is whether the defendant, exercising reasonable powers of observation, sees or should see that the buyer is intoxicated. *See Strand v. Village of Watson*, 245 Minn. 414, 422, 72 N.W.2d 609, 615 (1955).

Blood tests alone will not establish obvious intoxication as a matter of law. *See Seeley v. Sobczak*, 281 N.W.2d 368, 371 (Minn. 1979).

In *Clark v. Peterson*, 741 N.W.2d 136 (Minn. Ct. App. 2007), the court of appeals held that the sale of alcohol from a location that violated the compact-and-contiguous building requirement in M.S.A. § 340A.410, subd. 7 was an illegal sale for purposes of the Civil Damages Act.

Research References

West's Key Number Digest
Intoxicating Liquors ⚷286, 317

Legal Encyclopedias
C.J.S., Intoxicating Liquors §§ 642 to 647, 649 to 651, 682, 684

CIVJIG 45.20

"ALCOHOLIC BEVERAGE"—DEFINITION

Definition of "alcoholic beverage"

> The term "alcoholic beverage" means a beverage containing more than 0.5% alcohol by volume.

USE NOTE

This instruction defines "alcoholic beverage" as that term is used in the Civil Damage Act. It will be used in cases where the sale clearly involves an alcoholic beverage, unless it is used solely for definitional purposes to assist the jury in understanding the instructions.

AUTHORITIES

M.S.A. § 340A.101, subd. 2, defines "alcoholic beverage" as "any beverage containing more than one-half of one percent alcohol by volume." The jury instruction tracks this definition.

CIVJIG 45.25

"INTOXICATED"—DEFINITION

Definition of "intoxicated"

> A person is "intoxicated" when, as a result of drinking alcohol, he or she has lost control to any extent of his or her mental or physical faculties.

USE NOTE

Whether a person is intoxicated is relevant to the two causation questions in a Civil Damage Act claim. The illegal sale must have been a cause of the person's intoxication, and the intoxication must have been the proximate cause of the accident or injuries. This instruction defines the term as it is used in the causation elements.

AUTHORITIES

Intoxication within the general purview of the Civil Damage Act, M.S.A. § 340A.801, may be manifested in a variety of ways, depending upon the circumstances of each case. *See Hahn v. Ortonville*, 238 Minn. 428, 431–32, 57 N.W.2d 254, 258 (1953). As a general definition of "intoxicated," the Minnesota Supreme Court in *Strand v. Village of Watson*, 245 Minn. 414, 72 N.W.2d 609 (1955), approved the trial court's charge to the jury that:

> When any person from the use of intoxicating liquors has affected his reason or his faculties, or has rendered himself incoherent of speech, or has caused himself to lose control in any manner to any extent of the actions or motions of his person or body, such person in the contemplation of the law is intoxicated.

Strand v. Village of Watson, 245 Minn. at 421–22, 72 N.W.2d at 615; *see also Hahn v. Ortonville*, 238 Minn. 428, 57 N.W.2d 254 (1953).

"Under the influence of liquor," standing alone, does not meet the requirements of M.S.A. § 340A.801. *See Seeley v. Sobczak*, 281 N.W.2d 368, 371 (Minn. 1979); *Hartwig v. Loyal Order of Moose*, 253 Minn. 347, 364, 91 N.W.2d 794, 806 (1958); *Strand v. Village of Watson*, 245 Minn. 414, 421, 72 N.W.2d 609, 615 (1955). In light of this distinction, the court should refrain from explaining the meaning of the term "under the influence of an alcoholic beverage" unless it becomes necessary to prevent confusion.

Research References

West's Key Number Digest
Intoxicating Liquors ⚷286, 317

Legal Encyclopedias
C.J.S., Intoxicating Liquors §§ 642 to 647, 649 to 651, 682, 684

CIVJIG 45.30

CAUSATION

Give CIVJIG 27.10

USE NOTE

The supreme court has emphasized that an illegal sale must be the "proximate cause" of the injury or loss in Civil Damage Act cases. To satisfy the requirement, the same causation standard used in negligence cases (CIVJIG 27.10) is applicable in Civil Damage Act cases. CIVJIG 27.10 also applies to determine whether the intoxication was a cause of the accident or injury in question. As in other cases involving causation issues, the court may determine as a matter of law that a particular injury or accident was not proximately caused by an illegal sale.

AUTHORITIES

In *Kryzer v. Champlin American Legion No. 600*, 494 N.W.2d 35 (Minn. 1992), the supreme court considered the standard for determining causation in Civil Damage Act cases. The court of appeals in *Kryzer* adopted a "but for" standard for purposes of determining whether a sufficient causal connection is established between a person's intoxication and the injury caused. The supreme court rejected that standard, adhering to its previously stated standard:

> Forty years ago this court ruled that in order to establish liability pursuant to the civil damage act . . . the liquor illegally sold need not be the sole cause of intoxication, that it is enough if it be a "proximately contributing cause." . . . Thirty-seven years ago this court ruled that a claimant seeking recovery pursuant to the civil damage act must show that the defendant illegally sold intoxicating liquor which caused intoxication and "that such intoxication was the proximate cause of plaintiff's injuries." . . .
>
> Although we have not since had occasion to expressly require that the causal relationship be proximate, this court has never retreated from that requirement.

Kryzer v. Champlin American Legion No. 600, 494 N.W.2d at 36–37; *see also Kunza v. Pantze*, 531 N.W.2d 839 (Minn. 1995), reversing, 527 N.W.2d 846 (Minn. Ct. App. 1995); *Weber v. Au*, 512 N.W.2d 348, 350 (Minn. Ct. App. 1994).

The illegal sale of the alcoholic beverage must have been either the sole, or the cooperating, concurring, or contributing cause of the intoxicated person's intoxication. *See Hollerich v. Good Thunder*, 340 N.W.2d 665, 668 (Minn. 1983); *Murphy v. Hennen*, 264 Minn. 457, 463, 119 N.W.2d 489, 493 (1963); *Hahn v. Ortonville*, 238 Minn. 428, 432, 57 N.W.2d 254, 258–59 (1953).

There must be a "practical and substantial relationship" between the illegal sale and intoxication in order to establish the necessary causal relationship between the illegal sale and the intoxication. *See Hollerich v. Good Thunder*, 340 N.W.2d 665, 668 (Minn. 1983); *Kvanli v. Village of Watson*, 272 Minn. 481, 484, 139 N.W.2d 275, 277 (1965).

Osborne v. Twin Town Bowl, Inc., 749 N.W.2d 367 (Minn. 2008) clarified the proximate cause test for determining whether intoxication is the cause of an injury, and also the proof necessary to establish proximate cause. The case arose out of the death of 24-year-old Michael Riley, who jumped from a bridge after being stopped for DWI by a Minnesota State Highway Patrol officer who arrested but did not handcuff Riley. His family and girlfriend brought suit against Twin Town Bowl under the Civil Damages Act,alleging that he was illegally served alcohol there, that the illegal sale led to his intoxication, and that his intoxication caused his death.

Twin Town Bowl argued in its first motion for summary judgment and failure to state a claim upon which relief could be granted that Riley's intoxication was not a proximate cause of his death. The district denied the motion on the basis that dismissal was premature because of incomplete discovery. Twin City Bowl renewed its motion for summary judgment after the completion of further discovery. The plaintiffs submitted an expert psychological report in the form of an unnotarized affidavit as part of their response to Twin Town Bowl's motion. The expert examined Riley's medical and drug history and interviewed Riley's family and friends. The report noted that Riley often experienced blackouts when drinking excessively and that Riley's family and friends told him that Riley exhibited personality changes when he was intoxicated. The personality changes included "increased energy, flamboyance, grandiosity, aggressiveness, impulsivity, and thrill-seeking." The expert's opinion was that Riley may have been in a blackout state at the time he jumped into the river and that had Riley been sober, he would never have attempted such an escape.

The district court granted Twin Town Bowl's motion for summary judgment, concluding that there was "no evidence and no genuine issue of material fact on the causation issue." The court of appeals, one judge dissenting, affirmed. The Minnesota Supreme Court reversed. The sole issue on appeal was whether there was a genuine issue of material fact as to "whether Riley's intoxication was a proximate cause of him jumping to his death into the Minnesota River." The Minnesota Supreme Court held that the evidence was sufficient to deny Twin Town's motion for summary judgment.

The supreme court held that intoxication has to be *a* proximate cause but not *the* proximate cause of the injury giving rise to the dram shop claim, and that given the well-known effects of intoxication, expert testimony is unnecessary to establish that intoxication was a proximate cause of an injury.

Research References

West's Key Number Digest
Intoxicating Liquors ⚷291, 317

Legal Encyclopedias
C.J.S., Intoxicating Liquors §§ 642 to 645, 656, 682, 684

CIVJIG 45.35

CONTRIBUTION TO INTOXICATION BY PLAINTIFF

[The Committee recommends no instruction.]

USE NOTE

See CIVJIG 28.15 for the jury instruction on comparative fault. That instruction should be used in explaining to a jury what forms of fault are to be compared in Civil Damage Act cases.

AUTHORITIES

Prior to a 1990 amendment, the Civil Damage Act was interpreted to bar recovery by a person who contributed to the intoxicated person's condition by voluntarily and affirmatively participating in inducing that person's intoxication. Like voluntary intoxication, the "complicity" defense barred recovery. *Herrly v. Muzik*, 374 N.W.2d 275, 277 (Minn. 1985); *Martinson v. Monticello Mun. Liquors*, 297 Minn. 48, 52–53, 209 N.W.2d 902, 905 (1973); *Heveron v. Belgrade*, 288 Minn. 395, 401, 181 N.W.2d 692, 695 (1970); *Turk v. Long Branch Saloon, Inc.*, 280 Minn. 438, 442, 159 N.W.2d 903, 906 (1968). This defense is known as the complicity defense. The rationale for the defense is that a person who furnishes intoxicating liquor to another is not a person the legislature intended to protect under the Civil Damage Act. *See Herrly*, 374 N.W.2d at 277; *Turk*, 280 Minn. at 442, 159 N.W.2d at 906.

A 1990 amendment to the Comparative Fault Act included the former complete defense of complicity in the definition of "fault." *See* Act of May 3, 1990, ch. 555, §§ 19–20, 1990 Minn.Laws 1557, 1564. In *K.R. v. Sanford*, 605 N.W.2d 387 (Minn. 2000), the Minnesota Supreme Court held that a plaintiff's complicity in the illegal sale of alcohol is not a bar to recovery by the plaintiff for damages under the Civil Damage Act, but that it is a defense subject to comparison under the comparative fault act, M.S.A. § 604.01, subd. 1a. The court defined complicity as participating knowingly and affirmatively in the illegal sale that contributed to the intoxication, 605 N.W.2d at 391, *citing Turk v. Long Branch Saloon, Inc.*, 280 Minn. 438, 442, 159 N.W.2d 903, 906 (1968).

Research References

West's Key Number Digest
Intoxicating Liquors ⚷286, 317

Legal Encyclopedias
C.J.S., Intoxicating Liquors §§ 642 to 647, 649 to 651, 682, 684

CIVJIG 45.40

DEFENSE—GOOD FAITH AND REASONABLE RELIANCE ON PROOF OF AGE OF PERSON UNDER 21

[The Committee recommends no instruction. An appropriate special verdict question encompassing the issue of good faith reliance should be used.]

USE NOTE

Where the defendant who makes an illegal sale of an alcoholic beverage to a person under 21 relies on the person's representations of age as a defense, an appropriate special verdict question incorporating that issue should be framed. A suggested special verdict question is as follows:

> Did (name of defendant) reasonably and in good faith rely upon (name of minor's) representation of proof of age in selling an alcoholic beverage to (name of minor)?

AUTHORITIES

M.S.A. § 340A.801, subd. 3, states that the defense described in section 340A.503, subdivision 6, applies to actions under this section. M.S.A. § 340A.503, subd. 2(1) makes it unlawful for any person "to sell, barter, furnish, or give alcoholic beverages to a person under 21 years of age." M.S.A. § 340A.503, subd. 6, reads as follows:

> **Subd. 6**. (a) Proof of age for purchasing or consuming alcoholic beverages may be established only by one of the following:
>
> > (1) a valid driver's license or identification card issued by Minnesota, another state, or a province of Canada, and including the photograph and date of birth of the licensed person;
> >
> > (2) a valid military identification card issued by the United States Department of Defense; or
> >
> > (3) in the case of a foreign national, from a nation other than Canada, by a valid passport.
>
> (b) In a prosecution under subdivision 2, clause (1), it is a defense for the defendant to prove by a preponderance of the evidence that the defendant reasonably and in good faith relied upon representations of proof of age authorized in paragraph (a) in selling, bartering, furnishing, or giving the alcoholic beverage.

Research References

West's Key Number Digest
Intoxicating Liquors ⚷293, 317

Legal Encyclopedias
C.J.S., Intoxicating Liquors §§ 657, 682, 684

CIVJIG 45.42

RESPONSIBILITY FOR CONDUCT OF EMPLOYEE AUTHORIZED TO SELL ALCOHOLIC BEVERAGES

Responsibility for sale

> (Name of defendant) is responsible for the sale of alcoholic beverages by (his) (her) (its) employees.

USE NOTE

This is a statement of respondeat superior in Civil Damages Act cases. It should be used as a clarifying instruction to establish that persons or entities licensed to sell alcoholic beverages are responsible for the sales of alcoholic beverages by any employees who are authorized to sell alcoholic beverages in the licensed establishment.

AUTHORITIES

This instruction is based upon M.S.A. § 340A.501, which reads as follows:

> Every licensee is responsible for the conduct in the licensed establishment and any sale of alcoholic beverage by any employee authorized to sell alcoholic beverages in the establishment is the act of the licensee for the purposes of all provisions of this chapter except sections 340A.701, 340A.702, and 340A.703.

In *Urban v. American Legion Dept. of Minnesota*, 723 N.W.2d 1, 7 (Minn. 2006), the supreme court held that nonlicensees are not vicariously liable for violations of the Civil Damages Act.

CIVJIG 45.45

DAMAGES—MEANS OF SUPPORT AND PECUNIARY LOSS—COMBINED INSTRUCTION

Damages to means of support and other pecuniary loss

You must decide two types of damages:

1. Damages to means of support, and
2. Other pecuniary loss.

Means of support

A person's means of support has been damaged when the usual source of support has been [(and) (or) will be] lost or reduced.

Deciding damages for means of support

In deciding damages for means of support, you may consider:

1. The health, age, habits, talents, and success of (person giving support),
2. The life expectancy of (person giving support) [and the life expectancy of the person(s) getting support],
3. The occupation of (person giving support),
4. The past earnings of (person giving support),
5. The likely future earnings of (person giving support),
6. The prospects of the person bettering (himself) (herself) had [(he) (she) not been injured],
7. The contributions in the past of (person giving support), and

8. The likely future contributions of (person giving support).

Other pecuniary loss

Pecuniary loss is financial loss, but also includes loss of counsel, guidance, and aid.

You must decide on an amount of money that will fairly compensate the (surviving spouse) (next of kin) for (his) (her) (their) losses resulting from (the death) (injury).

Deciding damages for other pecuniary loss

In deciding damages for pecuniary loss, you may include:

1. [All reasonable expenses for a funeral and for burial or other arrangements],
2. [All reasonable expenses for support of (person giving support) because of the injuries that led to (his) (her) death],
3. [The probability of paying the debt owed by (person giving support)],
4. [The counsel, guidance, and aid that (person giving support) would have given to those getting support if (he) (she) (had lived) (not been injured)], and
5. [The advice, comfort, assistance, companionship, and protection that (child's name) would have given if (he) (she) (had lived) (not been injured)].

Factors not to consider

Do not include amounts for:

1. [Punishing the defendant],
2. [Grief, emotional distress of (persons getting support)], or

3. [Pain and suffering of (person giving support) before (his) (her) death].

Facts to exclude

Do not be influenced by the fact[s] that:

1. [The (persons getting support) (may have received) (may get) money or other property from (person giving support)'s estate],
2. [The (persons getting support) (may collect) (have collected) insurance, or workers' compensation benefits because of (persons giving support)'s death],
3. [The surviving spouse has remarried],
4. [The minor children have been emancipated], or
5. [There is no legal obligation to support the next of kin].

Calculation of damages

Calculate damages for means of support and pecuniary loss separately.

USE NOTE

In Civil Damage Act cases, the persons entitled to recover include a "spouse, child, parent, guardian, employer, or other person injured in person, property, or means of support, or who incurs other pecuniary loss." This instruction covers loss of means of support and pecuniary loss. The Committee recommends a single jury instruction covering both types of losses. The instruction eliminates potential overlap between the elements of damages. Because the persons entitled to recover are the same, the simplest way to deal with damages is in a merged instruction. Because of the variety of situations that may be involved, the instruction has to be tailored to the case.

AUTHORITIES

"Means of support" refers to the standard of living to which a person is accustomed and the source through which that standard is maintained. M.S.A. § 340A.801, subd. 1 applies when there is a loss or reduction of the means of providing the accustomed support. *See Paine v. Water Works Supply Co.*, 269 N.W.2d 725, 731 (Minn. 1978); *Herbes v. Holdingford*, 267 Minn. 75, 84, 125 N.W.2d 426, 432 (1963); *Bundy v. Fridley*, 265 Minn. 549, 553, 122 N.W.2d 585, 588–589 (1963); *State Farm Mut. Auto. Ins. Co. v. Isle*, 265 Minn. 360, 366, 122 N.W.2d 36, 40–41 (1963).

Because of the problems involved in distinguishing between "breadwinners" and "nonbreadwinners," the Committee has taken the position that a single instruction should be utilized in cases involving injury to or loss of means of support. This avoids making difficult distinctions in cases where, for example, both spouses are working, although they contribute differing amounts to the family income.

The language in the "Other pecuniary loss" section of the instruction was cited with approval in *Brua v. Minnesota Joint Underwriting Ass'n*, 778 N.W.2d 294, 304 (Minn. 2010).

Research References

West's Key Number Digest
Damages ⚷99; Intoxicating Liquors ⚷290, 311, 317

Legal Encyclopedias
C.J.S., Damages § 141; Intoxicating Liquors §§ 642 to 645, 655, 682, 684, 686 to 691; Parent and Child § 344

CIVJIG 45.50

DAMAGES—INJURY TO A MINOR

Parent's damages for injury to a minor child

A parent is entitled to damages because of injury to a minor child. You may include:

1. The value of the minor child's services
2. The minor child's earnings up to the age of majority.

USE NOTE

This instruction should be used in cases where the injury is to a minor child. If there is a question concerning pecuniary loss in the form of loss of the advice, comfort, assistance, companionship, and protection the child would have provided, the relevant part of CIVJIG 45.45 should be given.

AUTHORITIES

The supreme court has held that funeral expenses and loss of a minor child's services and earnings up to the time of majority constitute injury to property. *Fitzer v. Bloom*, 253 N.W.2d 395, 402 (Minn. 1977); *Glaesemann v. New Brighton*, 268 Minn. 432, 435, 130 N.W.2d 43, 45 (1964); *Herbes v. Holdingford*, 267 Minn. 75, 85, 125 N.W.2d 426, 433 (1963).

The instruction may also be used in cases where there is a claim for loss of means of support because of injury to a minor. The inclusion of the bracketed language concerning a claim for pecuniary loss due to the death of a minor is intended for use in such situations.

Research References

West's Key Number Digest

Damages ⚷99; Intoxicating Liquors ⚷312, 317

Legal Encyclopedias

C.J.S., Damages § 141; Intoxicating Liquors §§ 682, 684, 686 to 687, 689 to 691; Parent and Child § 344

CIVJIG 45.55

DAMAGES—BODILY INJURY

[The Committee recommends no instruction. For General Instructions on Damages and for Personal Damage Instructions, see Categories 90 and 91.]

USE NOTE

The Civil Damage Act permits recovery for personal injuries caused "by an intoxicated person or by the intoxication of another person" against "a person who caused the intoxication of that person by illegally selling alcoholic beverages." Where an action is for personal injuries, the usual damages instructions should be used.

AUTHORITIES

The Civil Damage Act permits recovery of damages for personal injuries that are caused by either an intoxicated person or the intoxication of another person against one who causes that intoxication by illegally selling alcoholic beverages. M.S.A. § 340A.801, subd. 1. Voluntarily intoxicated persons are not entitled to recover under the Civil Damage Act. *Herrly v. Muzik*, 374 N.W.2d 275, 277 (Minn. 1985). Persons who actively participated in the intoxication of the intoxicated person causing injury were also barred from recovery prior to a 1990 amendment to the Comparative Fault Act, M.S.A. § 604.01, subd. 1a, which made complicity subject to comparison as an element of fault.

Research References

West's Key Number Digest
Damages ⚷95, 97; Intoxicating Liquors ⚷312, 317

Legal Encyclopedias
C.J.S., Damages §§ 105, 107, 122 to 128, 163; Intoxicating Liquors §§ 682, 684, 686 to 687, 689 to 691; Parent and Child § 344

CIVJIG 45.60

COMMON LAW SOCIAL HOST LIABILITY

[The Committee recommends no instruction.]

AUTHORITIES

In 1990, the Minnesota Legislature amended the Civil Damage Act, M.S.A. § 340A.801, by adding a new subdivision 6, which states that:

> Nothing in this chapter precludes common law tort claims against any person 21 years old or older who knowingly provides or furnishes alcoholic beverages to a person under the age of 21 years.

Subdivision 6 operates as a threshold that must be met before common law tort liability may be imposed on the person providing or furnishing alcohol. Once the tort threshold in subdivision 6 is met, the plaintiff must still establish the elements necessary for the common law theory he or she asserts against the provider or furnisher of alcohol. At a minimum, a special verdict question and accompanying instructions covering the requirements in subdivision 6 will ordinarily have to be submitted to the jury. However, the Committee has taken no position on how the jury instructions covering the tort threshold in subdivision 6 should read, given the lack of clear law interpreting subdivision 6.

There are no supreme court opinions construing subdivision 6. However, the court of appeals in *VanWagner v. Mattison*, 533 N.W.2d 75 (Minn. Ct. App. 1995), rev. denied (Minn. Sept. 19, 1999) held that a voluntarily intoxicated minor could assert a claim against the person who provided him with an alcoholic beverage, but that the minor's contributory negligence in drinking the alcohol could be asserted by the defendant.

There are two other unpublished court of appeals decisions in the area that have some bearing on potential jury instructions. One, *Frisch v. Bassett*, 1996 WL 104770 (Minn. Ct. App. 1996), holds that the terms "providing" and "furnishing" are synonymous.

The other, *Opay v. Howard Lake Liquor Store*, 1995 WL 34838 (Minn. Ct. App. 1995), rev'd in part on other grounds, 531 N.W.2d 845 (Minn. 1995), construed the "knowingly provided or furnished" language in section 340A.801, subd. 6. The court of appeals said that:

> "Actual notice is synonymous with knowledge." (*Jefferson County Bank v. Erickson*), 188 Minn. 354, 357, 247 N.W.2d 245, 247 (1933) (quoting 5 Dunnell Minn. Digest (2d ed.) § 7230). The court considers that a social host has actual knowledge when he or she actually

provides or furnishes alcohol to a minor. See *Walker v. Kennedy*, 338 N.W.2d 254, 255 (Minn. 1983) ("essential element for social host liability" is that person being sued gave or furnished alcohol to guest).

The Minnesota decisions, including the dictum in *Walker v. Kennedy*, indicate that the person who is subject to liability must have actually provided or furnished alcohol to the person under 21. If "providing" and "furnishing" are synonymous terms, then subdivision 6's requirements should be satisfied if the plaintiff shows that the defendant actually provided alcohol to a person under 21 years of age. However, although that may be a sufficient condition to impose liability, it is not clear whether it is the exclusive way to establish that the threshold is met.

Subdivision 6 does not mandate imposition of liability on the person who furnishes or provides alcohol to the person under the age of 21 if the elements of the subdivision are met. However, M.S.A. § 340A.503, subd. 2(1), makes it unlawful "for any person * * * to sell, barter, furnish, or give alcoholic beverages to a person under 21 years of age." The similarity between subdivision 6 and M.S.A. § 340A.503, subd. 2(1), may mean that a finding that subdivision 6 is met will also establish negligence *per se*. If a showing that the defendant knowingly provided or furnished alcohol to a person under the age of 21 is a sufficient basis for also establishing common law fault, the causation issue would still remain. If it is not deemed a sufficient condition to establish fault, then, the statutory violation aside, the plaintiff will have to prove common law negligence. In that case, a separate question asking whether the defendant was negligent would have to be asked after the threshold question.

Research References

West's Key Number Digest
Intoxicating Liquors ⚷312, 317

Legal Encyclopedias
C.J.S., Intoxicating Liquors §§ 682, 684, 686 to 687, 689 to 691

CIVJIG 45.62

STATUTORY SOCIAL HOST LIABILITY—PERSON 21 OR OLDER RESPONSIBLE FOR INTOXICATION OF PERSON UNDER 21

[The Committee recommends no instruction.]

USE NOTE

In enacting M.S.A. § 340A.90, the legislature intended to impose liability on persons 21 years of age or older who contributed to the intoxication of a person under the age of 21, in certain specified circumstances. There is insufficient experience with the statute at this point to justify a set of jury instructions incorporating the statute. However, to the extent that the statute is intended by the legislature to parallel actions under the Civil Damage Act, M.S.A. § 340A.801, the instructions in that section may be used, where appropriate. If there are specific questions concerning the elements necessary to impose liability under M.S.A. § 340A.90 on a person 21 years or older, those questions could be the subject of specific special verdict questions that cover the elements. Those questions are noted in the Authorities following, and in CIVSVF 45.92.

Social host liability under M.S.A. § 340A.801, subd. 6, is covered in CIVJIG 45.60. Where there are combined actions under M.S.A. § 340A.801, subd. 6, and M.S.A. § 340A.90, there will be overlap in the questions the jury must be asked to resolve both cases.

AUTHORITIES

M.S.A. § 340A.90, effective August 1, 2000, provides for a civil cause of action against persons 21 years of age or older under certain circumstances where they provide alcohol to persons under the age of 21, or control premises where alcohol is being consumed and were in a position to prevent the consumption of alcohol by persons under the age of 21. The statute reads as follows:

> **Subdivision 1.** (a) A spouse, child, parent, guardian, employer, or other person injured in person, property, or means of support, or who incurs other pecuniary loss, by an intoxicated person under 21 years of age or by the intoxication of another person under 21 years of age, has for all damages sustained a right of action in the person's own name against a person who is 21 years or older who:
>
> > (1) had control over the premises and, being in a reasonable position to prevent the consumption of alcoholic beverages by that person, knowingly or recklessly permitted that

consumption and the consumption caused the intoxication of that person; or

(2) sold, bartered, furnished or gave to, or purchased for a person under the age of 21 years alcoholic beverages that caused the intoxication of that person.

This paragraph does not apply to sales licensed under this chapter.

(b) All damages recovered by a minor under this section must be paid either to the minor or to the minor's parent, guardian, or next friend as the court directs.

(c) An intoxicated person under the age of 21 years who caused the injury has no right of action under this section.

Subd. 2. There shall be no recovery by any insurance company for any subrogation claim pursuant to any subrogation clause of the uninsured, underinsured, collision, or other first-party coverages of a motor vehicle insurance policy as a result of payments made by the company to persons who have claims that arise in whole or in part under this section.

Subd. 3. (a) There shall be no coverage for liability created under this section under homeowner's insurance as defined under section 65A.27, unless:

(1) specifically covered in a policy; or

(2) covered by a rider attached to a policy.

(b) This subdivision expires on December 31, 2001.

The relationship between the cause of action created by M.S.A. § 340A.90 and the social host action permitted by M.S.A. § 340A.801, subd. 6, is unclear. M.S.A. § 340A.90 does not repeal the social host action, so both actions are apparently permitted.

If questions arise concerning the key elements necessary to impose liability, special verdict questions can be used to resolve those issues. The first basis of liability is set out in M.S.A. § 340A.90, subd. 1(a)(1), where the person 21 years of age or older "had control over the premises and, being in a reasonable position to prevent the consumption of alcoholic beverages by that person, knowingly or recklessly permitted that consumption and the consumption caused the intoxication of that person." The questions that would have to be answered are as follows:

1. Did (name of person 21 years of age or older) have control over (describe the property in question)?

2. Was (name of person 21 years of age or older) in a reason-

able position to prevent the consumption of alcoholic beverages by that (name of plaintiff)?

3. Did (name of person 21 years of age or older) knowingly or recklessly permit consumption of the alcohol by (name of plaintiff)?

The other basis for liability is set out in M.S.A. § 340A.90, subd. 1(a)(2), which imposes liability if the person 21 years of age or older "sold, bartered, furnished or gave to, or purchased for a person under the age of 21 years alcoholic beverages that caused the intoxication of that person." The question that would have to be answered to impose liability is as follows:

Did (name of person 21 years of age or older) (sell) (barter) (furnish) (give to) (purchase for) alcoholic beverages to (name of plaintiff)?

The answer to this question will also be potentially determinative of the issue of liability under M.S.A. § 340A.801, subd. 6. *See* CIVJIG 45.60.

The liability questions will have to be followed by causation questions. The action or inaction that resulted in the person under 21 obtaining alcohol would have to be a direct cause of that person's intoxication, and the intoxication would have to be a direct cause of the accident or injury in question. *See* CIVSVF 45.92.

SPECIAL VERDICT FORMS

CIVSVF 45.90

CIVIL DAMAGE ACT LIABILITY

1. Did (defendant bar) illegally sell an alcoholic beverage to (intoxicated person or person under 21)?

____
Yes or No

2. *If your answer to Question 1 was "Yes," then answer this question*: Did the illegal sale cause or contribute to the intoxication of (person receiving the alcoholic beverage)?

____
Yes or No

3. *If your answer to Question 2 was "Yes," then answer this question*: Was the intoxication resulting from the illegal sale a direct cause of the (plaintiff's injury) (damage to plaintiff's means of support) (damage to plaintiff's property) (plaintiff's pecuniary loss)?

____
Yes or No

4. Did (person receiving alcoholic beverage) (plaintiff) fail to exercise reasonable care for (his) (her) own safety?

____
Yes or No

5. *If your answer to Question 4 was "Yes," then answer this question*: Was such failure to exercise reasonable care a direct cause of the (injury) (death) of (person receiving alcoholic beverage)?

____
Yes or No

[If you answered "Yes" to Question 3 and you also answered "Yes" to Question 5, then answer Question 6.]

6. Taking 100% as the total fault attributable to both parties, what percentage of fault do you attribute to:

(defendant bar) ________%

(person receiving alcoholic beverage) ______%

TOTAL 100%

[You must answer Question 7, regardless of your answers to any of the other questions.]

7. What amount of money will fairly compensate (plaintiff) for:

a. Damage to means of support? $______
b. Pecuniary loss? $______
c. Property damage? $______

USE NOTE

This verdict form assumes a single bar illegally selling alcohol to a person who is subsequently injured, and a claim for loss of means of support and pecuniary loss due to that person's injuries or death.

The special verdict questions and their supporting jury instructions are as follows:

1. CIVJIG 45.10: Illegal Sale—General.
2. CIVJIG 27.10: Direct Cause.
3. CIVJIG 27.10: Direct Cause.
4. CIVJIG 25.10: Negligence.
5. CIVJIG 27.10: Direct Cause.
6. CIVJIG 28.15: Comparative Fault.
7. CIVJIG 45.15: Damages—Means of Support and Pecuniary Loss.

CIVSVF 45.91

CIVIL DAMAGE ACT LIABILITY—BAR AND INTOXICATED PERSON AS DEFENDANTS

1. Did (defendant bar) illegally sell an alcoholic beverage to (name of defendant)?

____
Yes or No

2. *If your answer to Question 1 was "Yes," then answer this question*: Did the illegal sale cause or contribute to the intoxication of (defendant)?

____
Yes or No

3. *If your answer to Question 2 was "Yes," then answer this question*: Was the intoxication resulting from the illegal sale a direct cause of the (collision) (accident) (event)?

____
Yes or No

4. Was (defendant) negligent?

____
Yes or No

5. *If your answer to Question 4 was "Yes," then answer this question*: Was such negligence by (defendant) a direct cause of the (collision) (accident) (event)?

____
Yes or No

6. Was (plaintiff) negligent?

____
Yes or No

7. *If your answer to Question 6 was "Yes," then answer this question*: Was such negligence by (plaintiff) a direct cause of the (collision) (accident) (event)?

____
Yes or No

[If you answered "Yes" to two or more of Questions 3, 5, and 7, then answer Question 8.]

8. Taking all of the fault that contributed as a direct cause of (plaintiff)'s damages to be 100%, what percentage do you attribute to:

(defendant bar)	________%
(defendant illegally served)	________%
(plaintiff)	________%
	TOTAL 100%

[You must answer Questions 9 and 10 regardless of your answers to any of the other questions.]

9. What amount of money will fairly and adequately compensate (plaintiff) for damages directly caused by the (collision) (accident) (event) up to the time of this verdict for:

a.	Past pain, disability and emotional distress	$________
b.	Past wage loss	$________
c.	Past healthcare expenses	$________
d.	Other past loss	$________

10. What amount of money will fairly and adequately compensate (person under 21) for damages reasonably certain to occur in the future, directly caused by the (collision) (accident) (event) for:

a.	Future pain, disability and emotional distress	$________
b.	Loss of future earning capacity	$________
c.	Future healthcare expenses	$________
d.	Other future loss	$________

USE NOTE

This verdict form assumes a single bar illegally selling alcohol to a person who causes an accident in which the plaintiff is injured. The person bringing suit against both the bar and the intoxicated person may be negligent, either because he or she drove negligently or because he or she participated in the intoxication of the person who was illegally served by the bar.

If the plaintiff participated in the intoxication of the intoxicated person, the plaintiff's negligence may consist of complicity.

The standard damages instructions are applicable in this case, rather than the damages instruction in CIVJIG 45.45.

The special verdict questions and their supporting jury instructions are as follows:

1. CIVJIG 45.10: Illegal Sale—General.
2. CIVJIG 27.10: Direct Cause.
3. CIVJIG 27.10: Direct Cause.
4. CIVJIG 25.10: Negligence.
5. CIVJIG 27.10: Direct Cause.
6. CIVJIG 28.10: Negligence.
7. CIVJIG 27.10: Direct Cause.
8. CIVJIG 28.15: Comparative Fault.

9a. CIVJIG 91.10: Items of Personal Damage—Past Damage—Bodily and Mental Harm.

9b. CIVJIG 91.20: Items of Personal Damage—Past Damage—Loss of Earnings.

9c. CIVJIG 91.15: Items of Personal Damage—Past Damage—Medical Supplies.

10a. CIVJIG 91.25: Items of Personal Damage—Future Damage—Bodily Harm and Mental Harm.

10b. CIVJIG 91.35: Items of Personal Damage—Future Damage—Loss of Earning Capacity.

11c. CIVJIG 91.30: Items of Personal Damage—Future Damage—Medical Supplies, Hospital, and Medical Expense.

CIVSVF 45.92

STATUTORY SOCIAL HOST LIABILITY BECAUSE OF INJURY TO PERSON UNDER 21

1. Did (defendant) have control over (describe the property in question)?

____
Yes or No

2. *If your answer to Question 1 was "Yes," then answer this question*: Was (defendant) in a reasonable position to prevent the consumption of alcoholic beverages by (person under 21)?

____
Yes or No

3. *If your answer to Question 2 was "Yes," then answer this question*: Did (defendant) knowingly or recklessly permit consumption of the alcohol by (person under 21)?

____
Yes or No

4. *No matter how you answered Question 3, answer this question*: Did (defendant) (sell) (barter) (furnish) (give to) (purchase) alcohol for (person under 21)?

____
Yes or No

5. *If your answer to either or both of Questions 3 or 4 was "Yes," then answer this question*: Was (person under 21)'s consumption of the alcohol a direct cause of (his) (her) intoxication?

____
Yes or No

6. *If your answer to Question 5 was "Yes," then answer this question*: Was (person under 21)'s intoxication a direct cause of the (accident) (injury) to (person under 21)?

____
Yes or No

7. Was (person under 21) negligent?

____
Yes or No

8. *If your answer to Question 7 was "Yes," then answer this question*: Was this negligence by (person under 21) a direct cause of the (collision) (accident) (event)?

____
Yes or No

If you answered "Yes" to Questions 6 and 8, then answer Question 9.

9. Taking all of the fault that contributed as a direct cause of the (collision) (accident) (event) as 100%, what percentage of negligence do you attribute to:

(defendant) ________%

(plaintiff) ________%

TOTAL 100%

[You must answer Question 10, regardless of your answers to any of the other questions.]

10. What amount of money will fairly compensate (person seeking recovery) for (loss of means of support and pecuniary or property damage) directly caused by the (accident) (injury) to (name of person under 21):

a. Damage to means of support? $________
b. Pecuniary loss? $________
c. Property damage? $________

USE NOTE

This special verdict form is intended for use in cases where a claim is brought under M.S.A. § 340A.90, effective August 1, 2000. It assumes that a claim for loss of means of support or pecuniary loss is brought for injury to a person under the age of 21. The verdict form includes a question covering the negligence of the person under 21, and a comparative fault question, in the event the determination is made that the fault of the person under 21 will reduce recovery of persons entitled to recover because of injuries to the person under 21.

The special verdict questions and their supporting jury instructions are as follows:

1. CIVJIG 45.62: Liability of Person 21 or Older.
2. CIVJIG 45.62: Liability of Person 21 or Older.
3. CIVJIG 45.62: Liability of Person 21 or Older.
4. CIVJIG 45.62: Liability of Person 21 or Older.
5. CIVJIG 45.62: Liability of Person 21 or Older.
6. CIVJIG 45.62: Liability of Person 21 or Older.
7. CIVJIG 25.10: Negligence.
8. CIVJIG 27.10: Direct Cause.
9. CIVJIG 28.15: Comparative Fault.
10. CIVJIG 45.34: Damages—Means of Support and Pecuniary Loss—Combined Instruction.

CIVSVF 45.93

COMMON LAW SOCIAL HOST LIABILITY BECAUSE OF INJURY TO PERSON UNDER 21

1. Did (defendant) knowingly provide or furnish alcohol to (plaintiff)?

_______________ Yes or No

2. *If your answer to Question 1 was "Yes," then answer this question*: Was (defendant) negligent in providing or furnishing alcohol to (plaintiff)?

_______________ Yes or No

3. *If your answer to Question 2 was "Yes," then answer this question*: Was this negligence by (defendant) a direct cause of the (collision) (accident) (event)?

_______________ Yes or No

4. Was (plaintiff) negligent?

_______________ Yes or No

5. *If your answer to Question 4 was "Yes," then answer this question*: Was this negligence by (plaintiff) a direct cause of the (collision) (accident) (event)?

_______________ Yes or No

If you answered "Yes" to Questions 3 and 5, then answer Question 6.

6. Taking all of the negligence that contributed as a direct cause of the (collision) (accident) (event) as 100%, what percentage of negligence do you attribute to:

(defendant) ________%

(plaintiff) ________%

TOTAL 100%

[You must answer Questions 7 and 8 regardless of your answers to any of the other questions.]

7. What amount of money will fairly and adequately compensate (plaintiff) for damages directly caused by the (collision) (accident) (event) up to the time of this verdict for:

a.	Past pain, disability and emotional distress	$_______
b.	Past wage loss	$_______
c.	Past healthcare expenses	$_______
d.	Other past loss	$_______

8. What amount of money will fairly and adequately compensate (person under 21) for damages reasonably certain to occur in the future, directly caused by the (collision) (accident) (event) for:

a.	Future pain, disability and emotional distress	$_______
b.	Loss of future earning capacity	$_______
c.	Future healthcare expenses	$_______
d.	Other future loss	$_______

USE NOTE

This special verdict form assumes a common law social host liability claim by a person under 21 years of age against a person 21 years of age or older who knowingly provided or furnished alcohol to that person.

The special verdict questions and their supporting jury instructions are as follows:

1. CIVJIG 45.60: Common Law Social Host Liability.
2. CIVJIG 25.10: Negligence.
3. CIVJIG 26.10: Direct Cause.
4. CIVJIG 25.10: Negligence.
5. CIVJIG 27.10: Direct Cause.
6. CIVJIG 28.15: Comparative Fault.

7a. CIVJIG 91.10: Items of Personal Damage—Past Damage—Bodily and Mental Harm.

7b. CIVJIG 91.20: Items of Personal Damage—Past Damage—Loss of Earnings.

7c. CIVJIG 91.15: Items of Personal Damage—Past Damage—Medical Supplies.

8a. CIVJIG 91.25: Items of Personal Damage—Future Damage—Bodily Harm and Mental Harm.

8b. CIVJIG 91.35: Items of Personal Damage—Future Damage—Loss of Earning Capacity.

8c. CIVJIG 91.30: Items of Personal Damage—Future Damage—Medical Supplies, Hospital, and Medical Expense.

AUTHORITIES

Common law social host liability has very narrow application in Minnesota. The controlling statute provides that nothing in the Civil Damage Act "precludes common law tort claims against any person 21 years old or older who knowingly provides or furnishes alcoholic beverages to a person under the age of 21 years." M.S.A. § 340A.801, subd. 6. In effect, the statute creates a window through which common tort liability may be imposed, if the plaintiff establishes that the defendant was 21 years of age or older and knowingly provides or furnished alcohol to a person under 21, but there still has to be a finding of negligence on the part of the defendant.

CIVSVF 45.94

STATUTORY AND COMMON LAW SOCIAL HOST LIABILITY

1. Did (defendant) (sell) (barter) (furnish) (give to) (purchase) alcohol for (person under 21)?

____
Yes or No

2. *If your answer to Question 1 was "Yes," then answer this question*: Was (defendant) negligent in (selling) (bartering) (furnishing) (giving) (providing) alcohol to (person under 21)?

____
Yes or No

3. *If your answer to either or both of Questions 1 or 2 was "Yes," then answer this question*: Was this (sale) (barter) (furnishing) (giving) of the alcohol to (person under 21) a direct cause of (his) (her) intoxication?

____
Yes or No

4. *If your answer to Question 5 was "Yes," then answer this question*: Was (person under 21)'s intoxication a direct cause of the (accident) (injury to person under 21)?

____
Yes or No

5. Was (person under 21) negligent?

____
Yes or No

6. *If your answer to question 5 was "Yes," then answer this question*: Was this negligence by (person under 21) a direct cause of the (collision) (accident) (event)?

____
Yes or No

If you answered "Yes" to Questions 4 and 6, then answer Question 7.

7. Taking all of the fault that contributed as a direct cause of the (collision) (accident) (event) as 100%, what percentage of negligence do you attribute to:

(defendant)	______%
(plaintiff)	______%
	TOTAL 100%

[You must answer Questions 8, 9, and 10 regardless of your answers to any of the other questions.]

8. What amount of money will fairly and adequately compensate (person under 21) for damages directly caused by the (collision) (accident) (event) up to the time of this verdict for:

a.	Past pain, disability and emotional distress	$______
b.	Past wage loss	$______
c.	Past healthcare expenses	$______
d.	Other past loss	$______

9. What amount of money will fairly and adequately compensate (person under 21) for damages reasonably certain to occur in the future, directly caused by the (collision) (accident) (event) for:

a.	Future pain, disability and emotional distress	$______
b.	Loss of future earning capacity	$______
c.	Future healthcare expenses	$______
d.	Other future loss	$______

10. What amount of money will fairly compensate (person seeking recovery) for (loss of means of support and pecuniary or property damage) directly caused by the (collision) (accident) (event) to (name of person under 21):

a.	Damage to means of support?	$______
b.	Pecuniary loss?	$______
c.	Property loss?	$______

USE NOTE

This special verdict form assumes that a claim for loss of means of support and pecuniary loss under M.S.A. § 340A.90 is consolidated with a claim by the person under 21 for his or her own injuries under M.S.A. § 340A.801, subd. 6, and that the central basis for both claims is based on the defendant's furnishing or providing alcohol to the person under 21.

The special verdict questions and their supporting jury instructions are as follows:

1. CIVJIG 45.62 and 45.60: Liability of Person 21 or Older and Common Law Social Host Liability.
2. CIVJIG 25.10: Negligence.
3. CIVJIG 27.10: Direct Cause.
4. CIVJIG 27.10: Direct Cause.
5. CIVJIG 25.10: Negligence.
6. CIVJIG 25.10: Direct Cause.
7. CIVJIG 28.15: Comparative Fault.

8a. CIVJIG 91.10: Items of Personal Damage—Past Damage—Bodily and Mental Harm.

8b. CIVJIG 91.20: Items of Personal Damage—Past Damage—Loss of Earnings.

8c. CIVJIG 91.15: Items of Personal Damage—Past Damage—Medical Supplies.

9a. CIVJIG 91.25: Items of Personal Damage—Future Damage—Bodily Harm and Mental Harm.

9b. CIVJIG 91.35: Items of Personal Damage—Future Damage—Loss of Earning Capacity.

9c. CIVJIG 91.30: Items of Personal Damage—Future Damage—Medical Supplies, Hospital, and Medical Expense.

10. CIVJIG 45.34: Damages—Means of Support and Pecuniary Loss—Combined Instruction.

CIVSVF 45.95

COMMON LAW SOCIAL HOST LIABILITY—INJURY TO THIRD PERSON

1. Did (defendant) knowingly provide or furnish alcohol to (defendant-person under 21)?

____
Yes or No

2. *If your answer to Question 1 was "Yes," then answer this question*: Was (defendant) negligent in providing or furnishing alcohol to (defendant-person under 21)?

____
Yes or No

3. *If your answer to Question 2 was "Yes," then answer this question*: Was this negligence by (defendant) a direct cause of the (collision) (accident) (event)?

____
Yes or No

4. Was (defendant-person under 21) negligent?

____
Yes or No

5. *If your answer to Question 4 was "Yes," then answer this question*: Was this negligence by (defendant-person under 21) a direct cause of the (collision) (accident) (event)?

____
Yes or No

6. Was (plaintiff) negligent?

____
Yes or No

7. *If your answer to Question 6 was "Yes," then answer this question*: Was this negligence by (plaintiff) a direct cause of the (collision) (accident) (event)?

____
Yes or No

If you answered "Yes" to two or more of Questions 3, 5, or 7, then answer Question 8.

8. Taking all of the negligence that contributed as a direct cause of the (collision) (accident) (event) as 100%, what percentage of negligence do you attribute to:

(defendant) ________%
(If you answered "Yes" to Question 3)

(defendant-person under 21) ________%
(If you answered "Yes" to Question 5)

(plaintiff) ________%
(If you answered "Yes" to Question 7)
TOTAL 100%

USE NOTE

This special verdict form assumes a claim by a third party, who may or not be contributorily negligent, against a person 21 years of age or older who knowingly provides or furnishes alcohol to a person under 21 years of age and negligently causes the injury-causing accident, and against the person under 21 who causes the accident.

The special verdict questions and their supporting jury instructions are as follows:

1. CIVJIG 45.60: Common Law Social Host Liability.
2. CIVJIG 25.10: Negligence.
3. CIVJIG 26.10: Direct Cause.
4. CIVJIG 25.10: Negligence.
5. CIVJIG 27.10: Direct Cause.
6. CIVJIG 25.10: Negligence.
7. CIVJIG 27.10: Direct Cause.
8. CIVJIG 28.15: Comparative Fault.

CIVSVF 45.96

STATUTORY AND COMMON LAW SOCIAL HOST LIABILITY—INJURY TO THIRD PERSON

1. Did (defendant) (sell) (barter) (furnish) (give to) (purchase) alcohol for (person under 21)?

_______________ Yes or No

2. *If your answer to Question 1 was "Yes," then answer this question*: Was (defendant) negligent in (selling) (bartering) (furnishing) (giving) (providing) alcohol to (person under 21)?

_______________ Yes or No

3. *If your answer to either or both of Questions 1 or 2 was "Yes," then answer this question*: Was this (sale) (barter) (furnishing) (giving) of the alcohol to (person under 21) a direct cause of (his) (her) intoxication?

_______________ Yes or No

4. *If your answer to Question 3 was "Yes," then answer this question*: Was (person under 21)'s intoxication a direct cause of the (accident) (injury) to (person under 21)?

_______________ Yes or No

5. Was (person under 21) negligent?

_______________ Yes or No

6. *If your answer to Question 5 was "Yes," then answer this question*: Was this negligence by (person under 21) a direct cause of the (collision) (accident) (event)?

_______________ Yes or No

7. Was (plaintiff) negligent?

_______________ Yes or No

8. *If your answer to Question 7 was "Yes," then answer this question*: Was this negligence by (plaintiff) a direct cause of the (collision) (accident) (event)?

____
Yes or No

If you answered "Yes" to two or more of Questions 4, 6, or 8, then answer Question 9.

9. Taking all of the fault that contributed as a direct cause of the (collision) (accident) (event) as 100%, what percentage of negligence do you attribute to:

(defendant) ________%
(If you answered "Yes" to Question 4)

(person under 21) ________%
(If you answered "Yes" to Question 6)

(plaintiff) ________%
(If you answered "Yes" to Question 8)

TOTAL 100%

[You must answer Questions 10 and 11 regardless of your answers to any of the other questions.]

10. What amount of money will fairly and adequately compensate (person under 21) for damages directly caused by the (collision) (accident) (event) up to the time of this verdict for:

a. Past pain, disability and emotional distress $________
b. Past wage loss $________
c. Past healthcare expenses $________
d. Other past loss $________

11. What amount of money will fairly and adequately compensate (person under 21) for damages reasonably certain to occur in the future, directly caused by the (collision) (accident) (event) for:

a. Future pain, disability and emotional distress $________
b. Loss of future earning capacity $________

c. Future healthcare expenses $________

d. Other future loss $________

USE NOTE

This special verdict form assumes that a claim for loss of means of support and pecuniary loss under M.S.A. § 340A.90 is consolidated with a claim by the person under 21 for his or her own injuries under M.S.A. § 340A.801, subd. 6, and that the central basis for both claims is based on the defendant's furnishing or providing alcohol to the person under 21.

The special verdict questions and their supporting jury instructions are as follows:

1. CIVJIG 45.62 and 45.60: Liability of Person 21 or Older and Common Law Social Host Liability.
2. CIVJIG 25.10: Negligence.
3. CIVJIG 27.10: Direct Cause.
4. CIVJIG 27.10: Direct Cause.
5. CIVJIG 25.10: Negligence.
6. CIVJIG 27.10: Direct Cause.
7. CIVJIG 25.10: Negligence.
8. CIVJIG 27.10: Direct Cause.
9. CIVJIG 28.15: Comparative Fault.

10a. CIVJIG 91.10: Items of Personal Damage—Past Damage—Bodily and Mental Harm.

10b. CIVJIG 91.20: Items of Personal Damage—Past Damage—Loss of Earnings.

10c. CIVJIG 91.15: Items of Personal Damage—Past Damage—Medical Supplies.

11a. CIVJIG 91.25: Items of Personal Damage—Future Damage—Bodily Harm and Mental Harm.

11b. CIVJIG 91.35: Items of Personal Damage—Future Damage—Loss of Earning Capacity.

11c. CIVJIG 91.30: Items of Personal Damage—Future Damage—Medical Supplies, Hospital, and Medical Expense.

[illegible]

[illegible]
[illegible]
Other [illegible]

1. CIVJIG [illegible] and 45.0[illegible]: Liability of Person [illegible] or Cit[illegible] and Common Law Social Host Lia[illegible]

2. CIVJIG 25.10: Negligence.

3. CIVJIG 27.10: Direct Cause.

CIVJIG 27.10: Direct Cause.

5. CIVJIG 25.10: Negligence.

6. CIVJIG 27.10: Direct Cause.

7. CIVJIG 25.10: Negligence.

8. CIVJIG 27.10: Direct Cause.

9. CIVJIG 28.10: Comparative Fault.

35. CIVJIG 91.15: [illegible] Person[illegible] Damage[illegible] [illegible] Medical Se[illegible]

36. [illegible] [illegible]: Items of Personal Damage—Future [illegible] [illegible] Harm and Mental Harm.

[illegible] 91.35: Items of [illegible] Damage—[illegible] Loss of [illegible] Ca[illegible]

CATEGORY 48

COMMON CARRIERS

Table of Instructions

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INTRODUCTORY NOTE

A common carrier is not an insurer of the safety of its passengers, *Vaughn v. Northwest Airlines, Inc.*, 558 N.W.2d 736, 742 (Minn. 1997); *Swanson v. Minneapolis, St. Ry.*, 252 Minn. 484, 487, 90 N.W.2d 514, 517 (1958), but the supreme court has held that common carriers must use the highest degree of care for their passengers. *Vaughn v. Northwest Airlines, Inc.*, 558 N.W.2d 736, 742 (Minn. 1997); *Lindstrom v. Yellow Taxi Co.*, 298 Minn. 224, 226, 214 N.W.2d 672, 674–75 (1974); *Ford v. Stevens*, 280 Minn. 16, 19–20, 157 N.W.2d 510, 513 (1968); *Urban v. Minneapolis St. Ry.*, 256 Minn. 1, 5, 96 N.W.2d 698, 700 (1959). Public conveyances fall into the common carrier category. Ambulance services, however, are excluded. *Bondy v. Allen*, 635 N.W.2d 244, 250–51 (Minn. Ct. App. 2001).

The court in *Vaughn* rejected any distinction between misfeasance and nonfeasance, holding that common carriers are also liable for "failure to affirmatively act and prevent harm to another." 558 N.W.2d at 743, citing *Donaldson v. Young Women's Christian Ass'n of Duluth*, 539 N.W.2d 789, 792 (Minn. 1995). The court in *Vaughn* also held that carriers owe a special duty of care to passengers whose disabilities are made known, 558 N.W.2d at 743, and that in some circumstances that duty includes providing assistance with baggage. 558 N.W.2d at 743. There are limitations on that duty. The carrier must have knowledge that the passenger has a physical disability and needs assistance with baggage in order to avoid injury. The carrier's duty to assist "is triggered when the carrier is in possession of facts that would suggest to a person of ordinary care and prudence that the physically disabled passenger needs assistance to avoid physical injury." Also, the physical injury to the passenger must have been reasonably foreseeable to the carrier, which means that the passenger will usually have to request assistance before the carrier's duty to assist arises. 558 N.W.2d at 744.

A person becomes a passenger when he puts himself or herself into the care of a common carrier to be transported, and is received and accepted as a passenger. Purchase of a ticket is not decisive as to the creation of the relationship of carrier and passenger, although it often fixes the time when the relationship commences. A ticket holder is entitled to the privileges of a passenger for a reasonable time before the carrier departs. *See Barnett v. Minneapolis & St. L. R.R.*, 123 Minn. 153, 156–157, 143 N.W. 263, 264 (1913). A person who enters a carrier but refuses to pay is considered a trespasser.

In general, the relationship of passenger and carrier does not terminate until the passenger has safely completed the act of alighting from the vehicle. *See Staloch v. Belsaas*, 271 Minn. 315, 324, 136 N.W.2d 92, 98 (1965); *Jam v. Independent School Dist. No. 709*, 413 N.W.2d 165, 170 (Minn. Ct. App. 1987), rev. denied (Minn. Nov. 24, 1987).

Common carriers that accept passengers are required to afford them the highest degree of care and foresight consistent with the orderly conduct of their business. This rule applies only to persons and matters within the control of the carrier. Thus, a carrier is required to exercise only ordinary care and prudence to prevent injury to its passengers from acts of strangers reasonably to be anticipated under the particular circumstances. *See Fewings v. Mendenhall*, 88 Minn. 336, 342–43, 93 N.W. 127, 129 (1903). *See also Hill v. Minneapolis St. Ry. Co.*, 112 Minn. 503, 506–507, 128 N.W. 831, 833 (1910).

A common carrier is strictly liable when an employee of the carrier assaults a passenger. *See Young v. St. Paul City Ry.*, 142 Minn. 10, 13, 170 N.W. 845, 846 (1919); *Ford v. Minneapolis St. Ry.*, 98 Minn. 96, 96–97, 107 N.W. 817, 817 (1906); *see also* Restatement (Second) of Agency § 214 cmt. e (1958). A common carrier also has a duty to use the utmost diligence in protecting passengers from assaults by other passengers. *Jansen v. Minneapolis & St. L. Ry.*, 112 Minn. 496, 498–99, 128 N.W. 826, 826–27 (1910).

Liability for damages attaches to the carrier for use of abusive language by an employee towards a passenger. *Lamson v. Great Northern Ry.*, 114 Minn. 182, 183–84, 130 N.W. 945, 945–46 (1911). *See also* Restatement (Second) of Torts § 48 (1965) ("A common carrier or other public utility is subject to liability to patrons utilizing its facilities for gross insults which reasonably offend them, inflicted by the utility's servants while otherwise acting within the scope of their employment.").

A common carrier may use reasonable force to eject a passenger who refuses to comply with reasonable rules and regulations of the carrier. *See* M.S.A. § 609.06(8) (reasonable force may be used "by a common carrier in expelling a passenger who refuses to obey a lawful requirement for the conduct of passengers and reasonable care is exercised with regard to the passenger's personal safety"); *Carpenter v. Minneapolis, St. P.R. & D. Elec. Traction Co.*, 133 Minn. 46, 47, 157 N.W. 902, 903 (1916); *Willard v. St. Paul City Ry.*, 116 Minn. 183, 185, 133 N.W. 465, 466 (1911); *Faber v. Chicago Great W. Ry. Co.*, 62 Minn. 433, 434–35, 64 N.W. 918, 919 (1895). The passenger need not have previous notice of the rule. It is an implied condition of the ticket that the passenger will conform to all reasonable rules. *See Faber*, 62 Minn. at 434–35, 64 N.W. at 919. The carrier must afford passengers a reasonable opportunity to comply with its rules and regulations. *See Reed v. Great Northern Ry.*, 76 Minn. 163, 166–67, 78 N.W. 974, 975 (1899).

CIVJIG 48.10

COMMON CARRIER—DUTY TO PASSENGER GENERALLY

Common carrier's duty to care for the safety of passengers

> (Name of carrier, e.g., bus company, airline, railroad, etc.) is a common carrier. A common carrier has a duty to use the highest degree of care to make sure its passengers are safe.
>
>> The "highest degree of care" means the utmost caution used by very careful persons. The amount of care given must also be consistent with the proper operation of the carrier's business.
>
> A common carrier is negligent when it fails to use this standard of care.

USE NOTE

This instruction is intended for use when the issue of a common carrier's negligence is in issue. A common carrier has the duty to use the highest degree of care for the safety of its passengers.

AUTHORITIES

A common carrier is not an insurer of the safety of its passengers. *Vaughn v. Northwest Airlines, Inc.*, 558 N.W.2d 736, 742 (Minn. 1997); *Swanson v. Minneapolis, St. Ry.*, 252 Minn. 484, 487, 90 N.W.2d 514, 517 (1958); *Heroff v. Metropolitan Transit Comm'n*, 373 N.W.2d 355, 357 (Minn. Ct. App. 1985); *Waldo v. St. Paul City Ry.*, 244 Minn. 416, 422, 70 N.W.2d 289, 293 (1955); *Hill v. Minneapolis St. Ry.*, 112 Minn. 503, 506, 128 N.W. 831, 833 (1910). Common carriers have a duty to exercise the highest degree of care and diligence for the safety of their passengers consistent with the practical operation of their businesses. *See Urban v. Minneapolis St. Ry.*, 256 Minn. 1, 5, 96 N.W.2d 698, 700 (1959); *Flaherty v. Minneapolis & St. L. Ry. Co.*, 251 Minn. 345, 347, 87 N.W.2d 633, 634 (1958); *Fieve v. Emmeck*, 248 Minn. 122, 126 n.1, 78 N.W.2d 343, 347 n.1 (1956). Such degree of care requires the utmost caution characteristic of very prudent persons. *See George v. Estate of Baker*, 724 N.W.2d 1, 6 (Minn. 2006); *Fieve*, 248 Minn. at 126 n. 1, 78 N.W.2d at 347 n. 1. *See also Lindstrom v. Yellow Taxi Co.*, 298 Minn. 224, 225–26, 214 N.W.2d 672, 674 (1974); *Ford v. Stevens*, 280 Minn. 16, 19, 157 N.W.2d 510, 513 (1968).

If a person does not hold himself out to the public generally to provide transportation, he will not be deemed a common carrier. *See Hammerlind v. Clear Lake Star Factory Skydiver's Club*, 258 N.W.2d 590, 593 n. 3 (Minn. 1977).

Research References

West's Key Number Digest
Carriers ⚷280, 302, 321

Legal Encyclopedias
C.J.S., Carriers §§ 2, 507 to 510, 559 to 561, 577, 586

CIVJIG 48.15

COMMON CARRIER—DEFINITION OF PASSENGER

Definition of "passenger"

A "passenger" on a common carrier is a person who:

1. [Intends to get on the vehicle with the carrier's direct or implied consent, or]
2. [Is in the process of getting on the vehicle, or]
3. [Is riding in the vehicle, or]
4. [Is getting off the vehicle and has had no reasonable opportunity to get beyond the danger zone of the vehicle].

USE NOTE

The issue of whether a person is a common carrier or a passenger should ordinarily be resolved as a matter of law. In that case, these definitional instructions will be used for definition purposes to clarify the other instructions covering the duties of common carriers.

AUTHORITIES

One becomes a passenger when he puts himself into the care of a common carrier to be transported, and is received and accepted as a passenger. Purchase of a ticket is not decisive as to the creation of the relationship of carrier and passenger, although it often fixes the time when the relationship commences. A ticket holder is entitled to the privileges of a passenger for a reasonable time before the carrier departs. *See Barnett v. Minneapolis & St. L. R.R.*, 123 Minn. 153, 156–157, 143 N.W. 263, 264 (1913). If a carrier stops at a usual place for receiving passengers, and a person gets on, or attempts to get on, the steps or platform of the vehicle to take passage, then that person is a passenger. *See Fenton v. Minneapolis, St. Ry.*, 252 Minn. 75, 79, 89 N.W.2d 404, 408 (1958); *Gaffney v. St. Paul City Ry.*, 81 Minn. 459, 461, 84 N.W. 304, 305 (1900); *Miller v. St. Paul City Ry.*, 66 Minn. 192, 193, 68 N.W. 862, 862 (1896); *Smith v. St. Paul City Ry.*, 32 Minn. 1, 2, 18 N.W. 827, 827 (1884).

If a person enters a carrier and refuses to pay his fare, he is a trespasser, not a passenger. *Wyman v. Northern Pac. Ry. Co.*, 34 Minn. 210, 212, 25 N.W. 349, 350 (1885). *But see Hardenbergh v. St. Paul, M. & M. Ry.*, 39 Minn. 3, 4–5, 38 N.W. 625, 626 (1888). Employees of a carrier traveling to and from work on a pass fall within the category of passengers. *See Radermacher v. St. Paul City Ry.*, 214 Minn. 427, 434, 8 N.W.2d 466, 470 (1943). Where a person solicits and secures free transportation, or rides upon a part of the vehicle from which passengers are excluded, or takes passage on a carrier not allowed to carry passengers, knowing his act is against the rules of the carrier, he is not protected as a passenger. *See McVeety v. St. Paul, M. & M. Ry.*, 45 Minn. 268, 269, 47 N.W. 809, 809–810 (1891).

As a general rule, the relationship of passenger and carrier does not terminate until the passenger has safely completed the act of alighting from the vehicle. *See Staloch v. Belsaas*, 271 Minn. 315, 324, 136 N.W.2d 92, 98 (1965); *Patton v. Minneapolis St. Ry.*, 247 Minn. 368, 370, 77 N.W.2d 433, 435 (1956); *Gillson v. Osborne*, 220 Minn. 122, 125, 19 N.W.2d 1, 3 (1945); *Reid v. Minneapolis St. Ry.*, 171 Minn. 31, 32, 213 N.W. 43, 43 (1927).

Research References

West's Key Number Digest
Carriers ⚷237.1, 321

Legal Encyclopedias
C.J.S., Carriers §§ 504, 577, 586

CIVJIG 48.20

COMMON CARRIER—DUTY—PLACE TO BOARD AND ALIGHT—STATIONS

Common carrier's duty to provide a safe place

> A common carrier has a duty to use reasonable care to provide a reasonably safe place where a (passenger) (person) may (wait for) (meet) (board) (get off) its vehicle.

USE NOTE

This instruction is intended for use in cases where there is an issue concerning the carrier's liability for failure to provide a reasonably safe place for passengers to wait for or board the carrier.

AUTHORITIES

A common carrier is required to exercise only reasonable care for the safety of its passengers and entrants on its premises in the construction and maintenance of depots and conveniences and facilities. *See Benson v. Northland Transp. Co.*, 200 Minn. 445, 448, 274 N.W. 532, 533 (1937); *McDonnell v. St. Paul Union Depot Co.*, 157 Minn. 66, 68, 195 N.W. 538, 539 (1923); *Hull v. Minneapolis*, St. P. & S. S. M. Ry. Co., 116 Minn. 349, 353, 133 N.W. 852, 854 (1911). A common carrier must exercise reasonable care in providing suitable and safe accommodations for discharging passengers. *See Massolt v. Minnetonka Casino Co.*, 103 Minn. 517, 518, 114 N.W. 1132, 1133 (1908); *see also Staloch v. Belsaas*, 271 Minn. 315, 324, 136 N.W.2d 92, 98 (1965).

Research References

West's Key Number Digest
Carriers ⚷287, 321

Legal Encyclopedias
C.J.S., Carriers §§ 542 to 551, 577, 586

CIVJIG 48.25

COMMON CARRIER—DUTY TO PROTECT PASSENGERS FROM INJURY BY THIRD PERSONS OTHER THAN PASSENGERS OR EMPLOYEES

Common carrier's duty to protect passengers from injury

> A common carrier has a duty to use reasonable care to protect its passengers from injury by persons who are not its passengers or employees.

USE NOTE

This instruction is intended for use in cases where a passenger is injured by a third person other than an employee of the common carrier. The duty in this case is one of reasonable care, as opposed to the strict liability standard for assaults by employees.

AUTHORITIES

Common carriers that accept passengers are required to afford them the highest degree of care and foresight consistent with the orderly conduct of their business. This rule applies only to persons and matters within the control of the carrier. The common carrier-passenger relationship is a special relationship that may require the common carrier to act for the protection of their customers. *See Delgado v. Lohmar*, 289 N.W.2d 479, 483 (Minn. 1979). Thus, a carrier is required to exercise only ordinary care and prudence to prevent injury to its passengers from acts of strangers reasonably to be anticipated under the particular circumstances. *See Fewings v. Mendenhall*, 88 Minn. 336, 342–343, 93 N.W. 127, 129 (1903). *See also Hill v. Minneapolis St. Ry. Co.*, 112 Minn. 503, 506–507, 128 N.W. 831, 833 (1910).

Research References

West's Key Number Digest
Carriers ⚷305(6), 321

Legal Encyclopedias
C.J.S., Carriers §§ 571 to 572, 577, 586

CIVJIG 48.30

DUTY OF COMMON CARRIER TO PROTECT PASSENGERS FROM OTHER PASSENGERS

Common carrier's duty to protect passengers from other passengers

> A common carrier has a duty to use the highest degree of care in accordance with proper business operations to protect its passengers from injury by other passengers.
>
> This duty applies when the accident or injury could reasonably have been foreseen and could have been prevented by the highest degree of care.

USE NOTE

This instruction is intended for use in cases where the claim arises out of injuries caused to one passenger by another. CIVJIG 48.15, defining "highest degree of care," should be used in conjunction with this instruction.

AUTHORITIES

It is the duty of a common carrier of passengers to exercise the highest diligence reasonably practicable to preserve order on its trains, and to protect passengers from violence, abuse, or injury from fellow passengers. This duty is exercised under an implied police power to prevent passengers from abusing their privileges. *See Jansen v. Minneapolis & St. L. Ry. Co.*, 112 Minn. 496, 498, 128 N.W. 826, 826 (1910); *Fewings v. Mendenhall*, 88 Minn. 336, 340–341, 93 N.W. 127, 129 (1903); *Lucy v. Chicago Great Western Ry. Co.*, 64 Minn. 7, 8, 65 N.W. 944, 945 (1896); *Mullan v. Wisconsin Cent. R.R. Co.*, 46 Minn. 474, 475, 49 N.W. 249, 249 (1891).

Research References

West's Key Number Digest
Carriers ⚿284, 321

Legal Encyclopedias
C.J.S., Carriers §§ 515, 577, 586

CIVJIG 48.35

COMMON CARRIER—DUTY TO PROTECT PASSENGERS FROM ASSAULT OR INTENTIONAL HARM BY EMPLOYEES

[The Committee recommends no instruction.]

USE NOTE

A common carrier is strictly liable for a passenger who has been assaulted or otherwise intentionally harmed by the carrier's employee. An appropriate special verdict question should be framed to determine whether the employee caused the harm. No instruction on the impact of that finding is necessary.

AUTHORITIES

A common carrier is strictly liable when an employee of the carrier assaults a passenger. *See Young v. St. Paul City Ry.*, 142 Minn. 10, 13, 170 N.W. 845, 846 (1919); *Ford v. Minneapolis St. Ry.*, 98 Minn. 96, 96–97, 107 N.W. 817, 817 (1906); *see also* Restatement (Third) of Agency § 7.05 cmt. e (2006).

Liability for damages attaches to the carrier for use of abusive language by an employee towards a passenger. *See Lamson v. Great Northern Ry.*, 114 Minn. 182, 183–84, 130 N.W. 945, 945–46 (1911). The Restatement (Second) of Torts § 48 (1965), takes the following position:

> A common carrier or other public utility is subject to liability to patrons utilizing its facilities for gross insults which reasonably offend them, inflicted by the utility's servants while otherwise acting within the scope of their employment.

Research References

West's Key Number Digest
Carriers ⚷283, 321

Legal Encyclopedias
C.J.S., Carriers §§ 514, 577, 586

CIVJIG 48.40

COMMON CARRIER—CONDUCT OF PASSENGERS—RIGHT OF CARRIERS TO EJECT

Common carrier's right to use reasonable force

A passenger must:

1. Behave like a reasonable passenger, and
2. Obey reasonable rules and regulations of the common carrier.

If a passenger does not:

1. Behave like a reasonable passenger, or
2. Obey reasonable rules and regulations of the common carrier,

then the employees of the common carrier can ask the passenger to leave.

If the passenger refuses to leave, the common carrier's employees can (remove) (restrain) the passenger.

If the passenger resists, the common carrier's employees can use reasonable force to (remove) (restrain) him or her.

A passenger accepts reasonable rules and regulations of a common carrier as a condition of riding, whether the passenger knew about the rules and regulations or not.

USE NOTE

A common carrier may use reasonable force to eject a passenger who does not comply with reasonable rules and regulations of the carrier.

AUTHORITIES

A common carrier may use reasonable force to eject a passenger who refuses to comply with reasonable rules and regulations of the carrier. *See* M.S.A. § 609.06(8); *Carpenter v. Minneapolis, St. P.R. & D. Elec. Traction Co.*, 133 Minn. 46, 47, 157 N.W. 902, 903 (1916); *Willard v. St. Paul City Ry.*, 116 Minn. 183, 185, 133 N.W. 465, 466 (1911); *Faber v. Chicago Great W. Ry. Co.*, 62 Minn. 433, 434–35, 64 N.W. 918, 919 (1895). The passenger need not have previous notice of the rule. It is an implied condition of the ticket that the passenger will conform to all reasonable rules. *See Faber*, 62 Minn. at 434–35, 64 N.W. at 919.

The carrier must afford passengers a reasonable opportunity to comply with its rules and regulations. *See Reed v. Great Northern Ry.*, 76 Minn. 163, 78 N.W. 974 (1899).

Research References

West's Key Number Digest
Carriers ⚷350, 375

Legal Encyclopedias
C.J.S., Carriers §§ 591 to 595

CIVJIG 48.45

NEGLIGENCE—RAILROAD CROSSING—DUTY OF PERSON CROSSING TRACKS

Give CIVJIG 65.10, and then, as items 3 and 4, add the following.

Care at railroad crossings

3. All drivers and pedestrians must use reasonable care to look and listen for trains and railroad vehicles when they approach a railroad crossing.

4. All drivers and pedestrians must yield the right of way to trains or railroad vehicles at railroad crossings if there is a reasonable chance of collision.

USE NOTE

CIVJIG 48.25 is to be used in railroad crossing cases to set forth the common law duties of due care. CIVJIG 25.20, the basic definition of negligence, should be given in conjunction with this instruction. When appropriate, CIVJIG 26.35 (emergency rule) may be given.

AUTHORITIES

If a railroad provides safety gates that are usually closed when trains approach, a person intending to cross the tracks must still use reasonable care under the circumstances. *See Seekins v. Duluth, M. & I. R. Ry.*, 258 Minn. 180, 183, 103 N.W.2d 239, 242 (1960); *Muggenburg v. Leighton*, 241 Minn. 498, 504, 63 N.W.2d 533, 537 (1954); *Olin v. Minnesota Transfer Ry.*, 164 Minn. 512, 515, 205 N.W. 440, 441 (1925). The supreme court has said that if a driver approaching a crossing has an adequate opportunity under the circumstances to see an approaching train in time to avoid a collision, the driver is contributorily negligent as a matter of law. *Hanson v. Duluth, M. & I. R. Ry.*, 267 Minn. 24, 27, 124 N.W.2d 486, 488 (1963).

Drivers must also yield the right of way to trains or railroad vehicles at railroad crossings. *E.g., Baldwin v. Chicago & N.W. Ry.*, 285 Minn. 15, 22, 171 N.W.2d 89, 93 (1969); *Hoyum v. Duluth, W. & P. Ry.*, 203 Minn. 35, 38, 279 N.W. 729, 730 (1938). M.S.A. § 169.26 also imposes obligations on drivers at railroad crossings:

Subdivision 1. Requirements. (a) Except as provided in section

169.28, subdivision 1, when any person driving a vehicle approaches a railroad grade crossing under any of the circumstances stated in this paragraph, the driver shall stop the vehicle not less than ten feet from the nearest railroad track and shall not proceed until safe to do so and until the roadway is clear of traffic so that the vehicle can proceed without stopping until the rear of the vehicle is at least ten feet past the farthest railroad track. These requirements apply when:

(1) a clearly visible electric or mechanical signal device warns of the immediate approach of a railroad train; or

(2) an approaching railroad train is plainly visible and is in hazardous proximity.

(b) The fact that a moving train approaching a railroad grade crossing is visible from the crossing is prima facie evidence that it is not safe to proceed.

(c) The driver of a vehicle shall stop and remain stopped and not traverse the grade crossing when a human flagger signals the approach or passage of a train or when a crossing gate is lowered warning of the immediate approach or passage of a railroad train. No person may drive a vehicle past a flagger at a railroad crossing until the flagger signals that the way is clear to proceed or drive a vehicle past a lowered crossing gate.

Research References

West's Key Number Digest
Railroads ⚷333, 351(12.1)

Legal Encyclopedias
C.J.S., Railroads §§ 1069 to 1070, 1079, 1149

subdivision 1, when [illegible]

a railroad grade crossing under any of the [illegible]

this paragraph [illegible]

to do so and [illegible]

can proceed without stopping until [illegible]

clear

[illegible] approach or passage of a train or when a crossing gate is lowered warning of the immediate approach or passage of a railroad train. No person may drive a vehicle past a flagger at a railroad crossing [illegible] flagger [illegible] clear [illegible]

past a lowered crossing gate [illegible]

West's Key Number Digest

Railroad ⟹ 233, 351(12.1)

If a railroad provides safety gates that are [illegible] approach, a person [illegible] reasonable care under the circumstances. [illegible] R. Ry., [illegible] Minn. 180, 183, 103 N.W.2d 2[illegible] (1960); [illegible] Leighton, 241 Minn. [illegible] 83 N.W.2d [illegible] (1954); [illegible] Ry., 1[illegible] Minn. [illegible], 205 N.W. 440, 441 [illegible] supreme court has said that if a driver [illegible] negligence [illegible] under the circumstances [illegible] train in time to avoid a collision, the [illegible] as a matter of law. [illegible] N.W.2d [illegible] (1963).

Drivers must also yield the right of [illegible]

CATEGORY 50

DEFAMATION

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INTRODUCTORY NOTE

There are two primary paths that defamation cases follow. In cases involving private plaintiffs who bring suit against private defendants for a defamatory communication that is a matter of private concern, the common law of defamation applies, along with common law privileges.

In cases involving the defamation of public officials or figures, or where the defamatory communication is a matter of public concern, the common law rules still apply, but they are modified by decisions of the United States Supreme Court that provide limited First Amendment privileges for the publishers of those communications. Those First Amendment limitations do not render the common law rules irrelevant, but the First Amendment limitations make it more difficult for a plaintiff to recover in a defamation case. The Supreme Court's decisions establish a First Amendment baseline, but meeting the standards imposed by the Court in defamation cases does not mean that a plaintiff will automatically be entitled to recover. States may not make it easier to recover in defamation cases, but they may make it more difficult by applying more stringent standards for recovery. As a general proposition, the most rigid law will apply to a defamation case. Meeting the standards in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), for example, means that in the Supreme Court's opinion, the plaintiff will be entitled to recover presumed damages and punitive damages upon a showing that a false statement of fact was published with actual malice. In Minnesota, however, meeting the standards in *New York Times Co. v. Sullivan* does not mean that recovery for damages will be permitted unless the plaintiff also meets the stringent statutory standards governing punitive damages in M.S.A. § 549.20.

The constitutional decisions affect the common law of defamation in at least three ways. Where the standards apply, a fault requirement is interposed, requiring a plaintiff who is a public official or public figure to prove *New York Times* "actual malice" by clear and convincing evidence in order to recover, and a private plaintiff involved in a matter of public concern to prove fault in the publication of the defamatory matter. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974).

The second impact concerns the plaintiff's right to recover damages in a defamation action. A public figure or official or a private person whose claim arises from a matter of public concern, who meets the *New York Times* actual malice standard is entitled to presumed damages. According to *Gertz*, as interpreted in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759–60, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985), if a private plaintiff whose claim arises from a matter of public concern is unable to establish actual malice, he or she must prove fault in the publication of the defamatory statement and must also prove actual damages in order to recover. In *Richie v. Paramount Pictures Corp.*, 544 N.W.2d 21, 28 (Minn. 1996), the Minnesota Supreme Court further modified that rule by requiring proof of actual injury to reputation before a plaintiff subject to the *Gertz* standard will be entitled to recover damages for emotional harm.

The third impact concerns burden of proof. The plaintiff's burden in cases where *New York Times Co. v. Sullivan* applies is to show with "convincing clarity" that the defendant published a false statement of fact with actual malice. That burden exceeds the usual burden of proof in civil cases.

Elements of Defamation. The elements of a defamation claim are:

1. The statement or communication must be defamatory;
2. The statement or communication must be false;
3. The statement or communication must refer to the plaintiff; and
4. The statement or communication must be published.

McKee v. Laurion, 825 N.W.2d 725, 729–30 (Minn. 2013); *Ferrell v. Cross*, 557 N.W.2d 560, 565 (Minn. 1997); *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 255 (Minn. 1980); *see also Corum v. Farm Credit Services*, 628 F.Supp. 707, 716 (D.Minn. 1986); *Frankson v. Design Space Intern.*, 394 N.W.2d 140, 142 (Minn. 1986); *Lewis v. Equitable Life Assurance Soc.*, 389 N.W.2d 876, 886 (Minn. 1986); *Geraci v. Eckankar*, 526 N.W.2d 391, 397 (Minn. Ct. App. 1995), cert. denied 516 U.S. 818, 116 S.Ct. 75, 133 L.Ed.2d 34 (1995); *Imperial Developers, Inc. v. Seaboard Surety Co.*, 518 N.W.2d 623, 627 (Minn. Ct. App. 1994); *Woody v. Krueger*, 374 N.W.2d 822, 824 (Minn. Ct. App. 1985).

1. *The Statement or Communication Must Have Been Defamatory.* A statement is defamatory if it disgraces and degrades the plaintiff; holds him up to public hatred, contempt, or ridicule, *see Advanced Training Sys., Inc. v. Caswell Equip. Co., Inc.*, 352 N.W.2d 1, 9 (Minn. 1984); *Morey v. Barnes*, 212 Minn. 153, 156, 2 N.W.2d 829, 831 (1942); or harms the plaintiff's reputation and lowers the plaintiff in the estimation of the community, *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 255 (Minn. 1980); *LeDoux v. Northwest Publishing, Inc.*, 521 N.W.2d 59, 67 (Minn. Ct. App. 1994), rev. denied (Minn. Nov. 16, 1994). In *Phipps v. Clark Oil & Ref. Corp.*, 408 N.W.2d 569 (Minn. 1987), the court stated that "[a] statement is defamatory when it 'tend[s] to injure the plaintiff's reputation and expose the plaintiff to public hatred, contempt, ridicule, or degradation.' " *Phipps v. Clark Oil & Ref. Corp.*, 408 N.W.2d at 573, *citing Church of Scientology v. Minnesota State Medical Ass'n Found.*, 264 N.W.2d 152, 155 (Minn. 1978), which in turn *cited Gadach v. Benton County Co-op. Ass'n*, 236 Minn. 507, 510, 53 N.W.2d 230, 232 (1952). The instructions in this category use the term "statement" rather than "communication." While libel is typically based on a statement that is embodied in some permanent form, *see* Restatement (Second) of Torts § 568 cmt. d (1977), other defamatory communications, such as "pictures, caricatures, statues and effigies are libels because the defamatory publication is embodied in physical form." Restatement (Second) of Torts § 568 cmt. d (1977).

In *Advanced Training Systems*, the supreme court *cited Byram v. Aikin*, 65 Minn. 87, 87, 67 N.W. 807, 808 (1896) as establishing the Minnesota position on libel:

> Written publications calculated to expose one to public contempt or ridicule, and thus induce an ill opinion of him, and impair him in the good opinion and respect of others, are libelous although they involve no imputation of crime, and are actionable without any allegation of special damages.

352 N.W.2d at 9.

The meaning of the defamatory statement may be established either on its face or through reference to extrinsic evidence. *See, e.g., Kervin v. News Tribune Co.*, 178 Minn. 61, 63, 225 N.W. 906, 907 (1929); *Ten Broeck v. Journal Printing Co.*, 166 Minn. 173, 207 N.W. 497 (1926). When the defamatory meaning is not apparent on its face, the plaintiff has the burden of pleading and proving such extrinsic facts. *See Anderson v. Kammeier*, 262 N.W.2d 366, 371 (Minn. 1977). In addition, the plaintiff must establish the defamatory sense of the publication through reference to such facts. *Anderson v. Kammeier*, 262 N.W.2d 366, 371 (Minn. 1977).

There is some inconsistency in the Minnesota cases as to whether a defamatory opinion is actionable. In *Weissman v. Sri Lanka Curry House, Inc.*, 469 N.W.2d 471 (Minn. Ct. App. 1991), the court of appeals said that:

> Minnesota common law makes no distinction between “fact” and “opinion.” A communication is defamatory if it causes enough harm to a person's reputation to lower the community's estimation of the individual or to deter others from associating or dealing with the individual . . . . Epithets or adjectives can constitute defamation if they imply a specific type of reprehensible conduct . . . .

Weissman v. Sri Lanka Curry House, Inc., 469 N.W.2d at 473 (citations omitted).

Other court of appeals decisions seem to conflict with *Weissman*. *Geraci v. Eckankar*, 526 N.W.2d 391, 397 (Minn. Ct. App. 1995), and *McGrath v. TCF Bank Savings, FSB*, 502 N.W.2d 801, 807–08 (Minn. Ct. App. 1993), modified on other grounds, 509 N.W.2d 365 (Minn. 1993), both take the position that only defamatory statements that assert facts are actionable. In *Geraci*, the court held that it was appropriate to take a defamation case away from a jury based on its conclusion that statements to the effect that the plaintiff “had poisoned the board,” was “out of control,” “a bad influence,” “emotional,” and “not a team player” were not actionable because “they do not contain facts or factual connotations that can be proven false.” 526 N.W.2d at 397. In *McGrath*, the court of appeals held that the phrase “troublemaker” was not actionable because it “lacks precision and specificity” and failed “to suggest verifiable false facts" about the plaintiff, and because "the ambiguity of the term . . . prevents any underlying facts from being inferred" from the phrase. 502 N.W.2d at 808. In *Hunter v. Hartman*, 545 N.W.2d 699 (Minn. Ct. App. 1996), rev. denied (Minn. June 19, 1996), the court of appeals noted that the United States Supreme Court in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990):

> rejected a developing body of federal circuit court case law that had created a wholesale exemption from defamation liability for statements of opinion. *Milkovich* held that even statements couched as opinions may be unprotected if they imply a defamatory factual assertion. *Milkovich*, 497 U.S. at 28–20, 110 S.Ct. at 2705–06. But the Court reserved protection for expressions of opinion not "sufficiently factual to be susceptible of being proved true or false." Id. at 21, 110 S. Ct. at 2707.
>
> [C]ontext is relevant to the process of distinguishing nonactionable statements of opinion from actionable statements . . . .

545 N.W.2d at 706 (citations omitted).

More recent decisions have taken the position that statements of opinion are not actionable, *see McKee v. Laurion*, 825 N.W.2d 725, 733 (Minn. 2013), and *State v. Crawley*, 819 N.W.2d 94 (Minn. 2012), unless they imply "the assertion of undisclosed facts." *See Rochester City Lines, Co. v. City of Rochester*, 846 N.W.2d 444, 467 (Minn. Ct. App. 2014); *Lund v. Chicago & Nw. Transp. Co.*, 467 N.W.2d 366, 369 (Minn. Ct. App. 1991). It is a question for the court to determine if an expression of opinion may reasonably be understood to imply the assertion of undisclosed facts. *Rochester City Lines*, 846 N.W.2d at 467–68, *citing Lund v. Chicago & Nw. Transp. Co.*, 467 N.W.2d 366, 369 (Minn.App.1991) (citing Restatement (Second) of Torts § 566 cmt. c (1977))

In *McKee*, the supreme court stated that

> The First Amendment protects statements of pure opinion from defamation claims. *Diesen v. Hessburg*, 455 N.W.2d 446, 450 (Minn.1990) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974)). Referring to someone as "a real tool" falls into the category of pure opinion because the term "real tool" cannot be reasonably interpreted as stating a fact and it cannot be proven true or false. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19–20, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990). We conclude that it is an opinion amounting to "mere vituperation and abuse" or "rhetorical hyperbole" that cannot be the basis for a defamation action. *See id.* at 17, 20, 110 S.Ct. 2695; Restatement (Second) of Torts § 566 cmt. e (1977) (explaining that people often engage in name-calling "without any real intent to make a defamatory assertion, and it is properly understood by reasonable listeners to amount to nothing more").

825 N.W.2d at 733.

In *Milkovich*, the United States Supreme Court recognized the fact/opinion distinction, however, given the requirement in cases with First Amendment implications that the plaintiff prove the existence of a false statement of fact, the Court thought it unnecessary to create "an artificial dichotomy between 'opinion' and fact." 497 U.S. at 19.

The cases are difficult to reconcile and must be examined carefully whenever the fact/opinion issue is raised. In *Knaeble v. Cowles Media Co.*, 1997 WL 33021 (Minn. Ct. App. 1997), the court of appeals noted that

> expressions of opinion, rhetoric, and figurative language are generally not actionable if, "in context, the audience would understand the statement is not a representation of fact." *Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d 437, 441 (Minn. Ct. App. 1986). Whether a statement is fact or opinion is a question of law . . . .
>
> Though not binding, courts also consider four factors to determine whether a statement is fact or opinion:
>
> (1) the statement's precision and specificity;
>
> (2) the statement's verifiability;
>
> (3) the [statement's] social and literary context . . . ; and
>
> (4) the statement's public context.

Huyen v. Driscoll, 479 N.W.2d 76, 79 (Minn. Ct. App. 1991), rev. denied (Minn. Feb. 10, 1992). *Toney v. WCCO Television*, 85 F.3d 383 (8th Cir. 1996) noted that even if the four-factor test taken from *Janklow v. Newsweek, Inc.*, 788 F.2d 1300 (8th Cir. 1986) (en banc), cert. denied, 479 U.S. 883, 107 S.Ct. 272, 93 L.Ed.2d 249 (1986) is not dispositive on the fact/opinion issue as a matter of constitutional law, at least some courts have found the test useful for purposes of determining whether a statement is capable of being proved false. 85 F.3d at 394.

In *Bolton v. Department of Human Services*, 540 N.W.2d 523 (Minn. 1995), the supreme court declined "the invitation to recognize a cause of action for defamation by conduct alone," reversing the court of appeals. *See Bolton*, 527 N.W.2d 149 (Minn. Ct. App. 1995). The supreme court stated that "[i]n substance, although words and conduct may support each other's meanings in the defamation context, . . . Minnesota has never recognized defamation by conduct alone." 540 N.W.2d at 525. In the context of a case where the plaintiff's defamation claim was based on the fact that he was escorted to the exit door upon his termination from his job, the court concluded that "where there is no word spoken or conduct other than a simple escorting of the plaintiff to the exit door . . . , we conclude that as a matter of law respondent was not defamed." *Bolton v. Department of Human Services*, 540 N.W.2d at 526.

2. *The Statement or Communication Must Be False.* At common law, a defamatory statement was presumed to be false, *see Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d 437, 440 (Minn. Ct. App. 1986), citing *Jadwin v. Minneapolis Star and Tribune Co.*, 367 N.W.2d 476, 480 (Minn. 1985), and the defendant would have the burden of proving the falsity of the defamatory statement. *See Lewis v. Equitable Life Assurance Soc.*, 389 N.W.2d 876, 888 (Minn. 1986); *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 255 (Minn. 1980). *See* CIVJIG 50.30, Authorities. However, since the United States Supreme Court has imposed constitutional standards on the common law of defamation, falsity is no longer presumed in all cases. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

In Minnesota, the courts appear to have presumed that the burden of proof on the truth issue has shifted to the plaintiff after *Gertz. See Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d 437, 440 (Minn. Ct. App. 1986). More recently, in *Bebo v. Delander*, 632 N.W.2d 732, 739 (Minn. Ct. App. 2001), rev. denied (Minn. Oct. 16, 2001) and *Benson v. Northwest Airlines, Inc.*, 561 N.W.2d 530 (Minn. Ct. App. 1997), rev. denied (Minn. June 11, 1997), the court of appeals held that the plaintiff bears the burden of proving falsity, even in private defamation cases, relying on dictum in recent Minnesota Supreme Court decisions. *See Ferrell v. Cross*, 557 N.W.2d 560, 565 (Minn. 1997); *Rouse v. Dunkley & Bennett, P.A.*, 520 N.W.2d 406, 410 (Minn. 1994).

Absent a definitive overruling of prior supreme court decisions by the supreme court, the Committee has left open the issue of which party has the burden of proving falsity in cases in which the constitutional standards are inapplicable.

3. *The Statement or Communication Must Refer to the Plaintiff.* An element that may be in issue is the requirement that the defamatory statement refer to the plaintiff. *See Brill v. Minnesota Mines*, 200 Minn. 454, 458, 274 N.W. 631, 633 (1937). It is an essential element in any defamation action. *See Covey v. Detroit Lakes Printing Co.*, 490 N.W.2d 138, 143 (Minn. Ct. App. 1992); *Huyen v. Driscoll*, 479 N.W.2d 76, 79 (Minn. Ct. App. 1991), rev. denied (Minn. Feb. 10, 1992). However, "[i]t is well settled that a public official cannot maintain a defamation action solely because of his association with the government agency being criticized." Id.

4. *Publication.* Generally, publication occurs when a defamatory statement is communicated to someone other than the plaintiff. *See Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 255 (Minn. 1980). Publication may arise in a variety of ways. *See, e.g., Frankson v. Design Space Intern.*, 394 N.W.2d 140, 143 (Minn. 1986) (intracorporate communications); *Brill v. Minnesota Mines*, 200 Minn. 454, 274 N.W. 631 (1937) (paragraph in letter); *McLaughlin v. Quinn*, 183 Minn. 568, 237

N.W. 598 (1931) (letters written by defendant); *Hansen v. Hansen*, 126 Minn. 426, 148 N.W. 457 (1914) (letters mailed to a third party); *Hebner v. Great Northern Ry. Co.*, 78 Minn. 289, 80 N.W. 1128 (1899) (in-house communication of a defamatory statement); *Jadwin v. Minneapolis Star and Tribune Co.*, 367 N.W.2d 476 (Minn. 1985) (newspapers).

In most cases, a publication does not occur when a defendant communicates a statement to a plaintiff who in turn communicates it to a third person. *See Lewis v. Equitable Life Assurance Soc.*, 389 N.W.2d 876, 886 (Minn. 1986). The court in *Lewis* recognized that the publication requirement can be satisfied through self-publication. The court held that where a plaintiff is compelled to publish a defamatory statement to a third person, and it was foreseeable to the defendant that the plaintiff would be compelled to do so, then publication has occurred. *Lewis v. Equitable Life Assurance Soc.*, 389 N.W.2d at 888. *See also Oaks Gallery and Country Store-Winona, Inc. v. Lee Enterprises, Inc.*, 613 N.W.2d 800, 803, (Minn. Ct. App. 2000).

Libel, Slander, and Defamation *Per Se*. At common law, damages are presumed from any libel. *See Advanced Training Systems, Inc. v. Caswell Equip. Co., Inc.*, 352 N.W.2d 1, 9 (Minn. 1984). Slander is not actionable without proof of special damages, unless the defamatory statement falls within one of the categories of slander *per se*. There are four categories of slander *per se* that have been recognized by the courts. They are defamatory statements that (1) affect a person in his business, trade, or profession; (2) impute a loathsome disease to the plaintiff; (3) impute unchastity to a woman; and (4) charges of a crime, or a crime involving moral turpitude. *See Anderson v. Kammeier*, 262 N.W.2d 366, 372 (Minn. 1977); *see also Larson v. R.B. Wrigley Co.*, 183 Minn. 28, 29, 235 N.W. 393, 394 (1931) (stating that two classes of words are actionable *per se*: (1) words charging the commission of a crime involving moral turpitude, and (2) words that directly disparage and tend to prejudice and injure a person in his office, profession, trade, or business). In *Advanced Training Sys., Inc. v. Caswell Equip. Co., Inc.*, 352 N.W.2d 1, 9 n. 1 (Minn. 1984), the court noted the slander *per se* categories of "imputation of crime, loathsome disease, defamation affecting business, or unchastity in a woman." Where the plaintiff establishes one of the categories of slander *per se* or special damages, general damages are then presumed.

In some of the appellate decisions in Minnesota, the courts have mingled the slander *per se* rule with libel law to produce a hybrid claim of defamation *per se*. *E.g., Richie v. Paramount Pictures Corp.*, 544 N.W.2d 21, 25 (Minn. 1996) ("[I]n cases of defamation per se, the common law allowed harm to reputation to be presumed."); *Becker v. Alloy Hardfacing & Engineering Co.*, 401 N.W.2d 655, 661 (Minn. 1987) ("Among those types of actions which are defamatory per se are false accusations of committing a crime and false statements about a person's business, trade, or professional conduct."). The problem is that if the rules governing libel and slander are mixed, the conclusion may be that the plaintiff in a libel case will not be allowed to recover presumed damages unless her claim fits within one of the common law categories of slander *per se*, a conclusion that is directly in conflict with the supreme court's clear statement of the law in *Advanced Training Sys., Inc. v. Caswell Equip. Co., Inc.*, 352 N.W.2d 1, 9, n. 1 (Minn. 1984) that damages are presumed in libel cases. Accordingly, the instructions in this section make no mention of defamation *per se*.

Defamation and Emotional Distress Claims. The Minnesota Supreme Court and the Minnesota Court of Appeals have repeatedly stated that recovery for negligent infliction of emotional distress is allowed only if the plaintiff is within the zone of danger of a physical impact, fears for her own safety, and suffers emotional distress as established by physical injury or manifestations. An exception exists when the plaintiff suffers a direct invasion of her rights, such as "defamation, malicious prosecution or other willful or malicious conduct." *State Farm Mutual Auto. Ins. Co. v. Village of Isle*, 265 Minn. 360, 367–68, 122 N.W.2d 36, 41 (1963).

Appellate interpretations of the *State Farm* case have been a continuing source of confusion for the courts in cases involving the assertion of both defamation and negligent infliction of emotional distress claims. In general, damages for emotional distress are not recoverable in a negligence case unless the plaintiff is in the zone of physical danger. On the other hand, if the plaintiff is able to establish the elements of a defamation claim sufficient to support presumed damages, the claim for negligent infliction of emotional distress adds nothing to the claim. More recently, the supreme court in *Lickteig v. Alderson, Ondov, Leonard & Sween, P.A.*, 556 N.W.2d 557 (Minn. 1996) clarified the distinction:

> In tort cases, emotional distress may be an element of damages in only three circumstances. First, a plaintiff who suffers a physical injury as a result of another's negligence may recover for the accompanying mental anguish . . . . Second, a plaintiff may recover for negligent infliction of emotional distress when physical symptoms arise after and because of emotional distress, if the plaintiff was actually exposed to physical harm as a result of the negligence of another (the "zone-of-danger" rule) . . . . Finally, a plaintiff may recover emotional distress damages when there has been a "direct invasion of the plaintiff's rights such as that constituting slander, libel, malicious prosecution, seduction, or other like willful, wanton, or malicious conduct." *State Farm Mut. Auto. Ins. Co. v. Village of Isle*, 265 Minn. 360, 368, 122 N.W.2d 36, 41 (1963) . . . .

Lickteig v. Alderson, Ondov, Leonard & Sween, P.A., 556 N.W.2d at 560 (citations omitted). The court also noted that where damages for emotional distress are claimed in a so-called "willful conduct" case, such as one involving a slander claim, the damages are parasitic to the claim. *Lickteig v. Alderson, Ondov, Leonard & Sween, P.A.*, 556 N.W.2d at 560, n.4. The court's interpretation of the law is consistent with its earlier opinion in the *State Farm* case. Properly understood, then, the claim for negligent infliction of emotional distress adds nothing to the defamation claim.

Constitutional Limitations. In *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), the United States Supreme Court held that public officials who are libeled must prove with convincing clarity that the libelous statements were published with actual malice. Actual malice is established by showing that the publication was made with knowledge of the falsity of the statement or in reckless disregard of the truth or falsity of the statement. *New York Times Co. v. Sullivan*, 376 U.S. at 279–80. Reckless disregard means publication with substantial doubts about the truth of the matter. *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262, 267 (1968). The holding in New York Times Co. was extended to public figures in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967), reh. denied, 389 U.S. 889, 88 S.Ct. 11, 19 L.Ed.2d 197 (1967). The Minnesota Supreme Court has held that "Minnesota affords to nonmedia defendants the same first amendment protection for criticism of public officials that it grants to the mass media." *Britton v. Koep*, 470 N.W.2d 518, 521 (Minn. 1991).

In *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971), the United States Supreme Court held in a plurality opinion that the *New York Times Co.* actual malice standard applied to public issues as well as to public officials and figures. However, in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), the Court rejected the *New York Times Co.* actual malice standard as the appropriate standard for defamation cases brought by private plaintiffs against nonmedia defendants.

In *Gertz*, the Supreme Court held that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." 418 U.S. at 347, 94 S.Ct. at 3010–11. The Court also held that a private defamation plaintiff "who establishes liability under a less demanding standard than that stated by New York Times may recover only such damages as are sufficient to compensate him for actual injury." *Gertz v. Robert Welch, Inc.*, 418 U.S. at 350, 94 S.Ct. at 3012. The Court did not define the term "actual injury," deferring instead to the wide experience of trial courts in fashioning appropriate jury instructions for tort cases. *Gertz v. Robert Welch, Inc.*, 418 U.S. at 350, 94 S.Ct. at 3012.

In response to *Gertz*, the Minnesota Supreme Court adopted a negligence standard for private individuals asserting defamation claims in Minnesota, stating that "a private individual may recover actual damages for a defamatory publication upon proof that the defendant knew or in the exercise of reasonable care should have known that the defamatory statement was false." *Jadwin v. Minneapolis Star Tribune Co.*, 367 N.W.2d 476, 491 (Minn. 1985). The Minnesota Supreme Court further restricted the application of *Gertz* in holding that a private figure plaintiff who challenges speech on a matter of public concern is not entitled to recover damages for emotional distress absent proof of actual harm to reputation. *Richie v. Paramount Pictures Corp.*, 544 N.W.2d 21, 28 (Minn. 1996).

In deciding whether a private plaintiff's claim arises from speech on a matter of public concern, the Supreme Court requires courts to examine the "content, form and context" of the statement at issue. *Dunn & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 762, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985). The Court adopted the standard from its earlier decision in *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), a case involving the issue of whether speech is too private to deserve First Amendment protection from discharge by a public employer.

Whether the plaintiff in a defamation action is a public or private figure is a question of law for the court. *Chafoulias v. Peterson*, 668 N.W.2d 642, 649 (Minn. 2003), reh. granted (Minn. Sept. 17, 2003) (case remanded to court of appeals to determine the issues raised in alternative grounds for summary judgment presented in respondent Peterson's notice of review); *Britton v. Koep*, 470 N.W.2d 518, 520 (Minn. 1991); *Jadwin v. Minneapolis Star Tribune Co.*, 367 N.W.2d 476, 483 (Minn. 1985). Determining whether a person is a private defamation plaintiff for purposes of a defamation action is a process of elimination. Private persons are those who are neither public officials nor public figures.

In *Chafoulias*, the Minnesota Supreme Court addressed the issue of fact finding as a predicate to resolution of the constitutional issue of whether a person is a limited purpose public figure. The court noted that the United States Supreme Court has not prescribed a clear method of resolving contested fact issues while determining the existence of a constitutional privilege as a matter of law. The Minnesota Supreme Court concluded that the United States Constitution permitted states to resolve fact issues material to the existence of the privilege by using traditional methods:

> That could include submission to a jury for special interrogatory verdicts or under specific instruction as to the elements of the privilege. Alternatively, it could include pretrial submission to the district court for determination by specific findings of fact based upon an evidentiary hearing, subject to appellate review for clear error.

Chafoulias v. Peterson, 668 N.W.2d at 650. In *Chafoulias*, the district court conducted a pretrial evidentiary hearing to determine whether the plaintiff was a limited public purpose public figure. The supreme court held that it was a permissible alternative, and that the process the district court followed was within its discretion. *Chafoulias v. Peterson*, 668 N.W.2d at 650–51.

In *Britton v. Koep*, 470 N.W.2d 518, 520 (Minn. 1991), the Minnesota Supreme Court utilized three criteria in determining whether a county probation officer is a public official for purposes of the *New York Times Co.* rule. The first is whether the official performed governmental duties directly related to the public interest. The second is whether the official holds a position to significantly influence the resolution of public issues. The third is whether the official has, or appears to the public to have, "substantial responsibility for or control over the conduct of government affairs." *Britton v. Koep*, 470 N.W.2d 518, 520 (Minn. 1991).

In *Elstrom v. Independent School Dist. No. 270*, 533 N.W.2d 51 (Minn. Ct. App. 1995), *rev. denied* (Minn. July 27, 1995), the court of appeals applied a similar standard taken from *Rosenblatt v. Baer*, 383 U.S. 75, 86 S.Ct. 669, 15 L.Ed.2d 597 (1966), in holding that a public school teacher is a public official:

> Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees . . . the New York times malice standards apply.

Rosenblatt, 383 U.S. at 86, 86 S.Ct. at 676.

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), the Supreme Court established three categories of public figures:

> Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare. For the most part those who attain this status have assumed roles of special prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

Gertz v. Robert Welch, Inc., 418 U.S. at 345. The public figure standards were further elaborated in subsequent cases. *E.g., Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 99 S.Ct. 2701, 61 L.Ed.2d 450 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d 411 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154 (1976).

The Minnesota courts have followed those standards. *E.g., Chafoulias v. Peterson*, 668 N.W.2d 642, 652 (Minn. 2003); *Jacobson v. Rochester Communications Corp., Inc.*, 410 N.W.2d 830, 833–36 (Minn. 1987);

Jadwin v. Minneapolis Star and Tribune Co., 367 N.W.2d 476, 485–86 (Minn. 1985).

The supreme court in *Chafoulias* noted that the criteria to be used in determining whether a person is a limited purpose public figure are suggested by *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974):

> (1) whether a public controversy existed; (2) whether the plaintiff played a meaningful role in the controversy; and (3) whether the allegedly defamatory statement related to the controversy.

668 N.W.2d at 651.

The court in *Chafoulias* defined a "public controversy" as follows:

> A public controversy is a dispute that "has received public attention because its ramifications will be felt by persons who are not direct participants." . . . Private concerns are not public controversies simply because they attract attention . . . . In isolating the public controversy, courts look to those controversies that are already the subject of debate in the public arena at the time of the alleged defamation . . . .
>
> But the scope of the public controversy, for this purpose, may be narrower than the breadth of the public's interest. Many stories may be considered "newsworthy" and deserving of the public's attention, but may not be a "public controversy." A public controversy requires two elements: (1) there must be some real dispute that is being publicly debated; and (2) it must be reasonably foreseeable that the dispute could have substantial ramifications for persons beyond the immediate participants . . . .
>
> Under this definition, the existence of a private civil dispute is not necessarily a public controversy. Although such a dispute may receive publicity by inevitably becoming public when filed in court, or when a party chooses to make his or her allegations public, the courts have recognized that the mere participation in the litigation of such disputes does not create a public controversy that confers public figure status . . . .

668 N.W.2d at 652 (citations omitted).

If there is a public controversy, the next step is to determine the role of the person in that controversy. The Minnesota Supreme Court in *Chafoulias* relied in part on *Gertz* in concluding that the issue is whether the person " 'voluntarily inject[ed] himself' or was 'drawn into' that controversy." 668 N.W.2d at 652, *citing Gertz*, 418 U.S. at 351. That means considering whether the person has "thrust himself to the forefront of the controversy as we have defined it so as to achieve a 'special prominence' in the debate and become a factor in resolving the controversy." 668 N.W.2d at 653.

The person "must either 'have been purposely trying to influence the outcome' of the controversy or must have realistically 'expected, because of his position in the controversy, to have an impact on its resolution.' " 668 N.W.2d at 653, *citing Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1297 (D.C. Cir. 1980), cert. denied, 449 U.S. 898, 101 S.Ct. 266, 66 L.Ed.2d 128 (1980). The supreme court said that the analysis requires examination of the extent to which the person's participation in the controversy was voluntary, the extent to which the person had access to effective channels of communication to counteract false statements, and the prominence of the role the person played in the public controversy. 668 N.W.2d at 653.

The final factor, the relationship of the statement to the public controversy, requires an examination of whether the statement "relates directly" to the controversy or is "necessarily germane" to the controversy. 668 N.W.2d at 654.

In *Chafoulias*, the supreme court held that a defendant "cannot take advantage of the limited purpose public figure privilege with respect to a public controversy that she caused." 668 N.W.2d at 654. In *Chafoulias*, the attorney-defendant in the case filed sexual harassment claims filed against the plaintiff in federal court. There was attendant publicity surrounding the harassment claims. The court held that if the attorney "was the source of the media coverage that she relies upon to establish a public controversy, she would be disqualified from asserting the privilege for speech concerning a limited purpose public figure." 668 N.W.2d at 656.

Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), applies in defamation cases brought by private persons. In *Jadwin v. Minneapolis Star Tribune Co.*, 367 N.W.2d 476, 487–88 (Minn. 1985), the Minnesota Supreme Court took a different position with respect to corporate plaintiffs:

> We hold . . . that corporate plaintiffs in defamation actions must prove actual malice by media defendants when the defendants establish that the defamatory material concerns matters of legitimate public interest in the geographic area in which the defamatory material is published, either because of the nature of the business conducted or because the public has an especially strong interest in the investigation or disclosure of the commercial information at issue. Such a rule will encourage the media to probe the business world to the depth which is necessary to permit the kind of business reporting vital to an informed public.

Corporate plaintiffs must therefore prove actual malice when the defendants established that the matter published is of legitimate public concern.

In *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989), the United States Supreme Court expressed concern over a jury's ability to understand the New York Times Co. actual malice standard, which cannot be satisfied through proof of "ill will or 'malice' in the ordinary sense of the term." 491 U.S. at 666, 109 S.Ct. at 2685. To minimize the possibility of misunderstanding the standard, the Court took the position that the jury should be instructed " 'in plain English' at appropriate times during the course of the trial concerning the not-so-plain meaning of this phrase." 491 U.S. at 667 n. 7, 109 S.Ct. at 2686 n.7.

Common Law Privileges. The Minnesota Supreme Court has recognized two types of privileges, absolute and qualified. *See Minke v. City of Minneapolis*, 845 N.W.2d 179, 182 (Minn. 2014). The privileges exist because "statements made in particular contexts or on certain occasions should be encouraged despite the risk tht the statements might be defamatory." *Id.,* citing *Lewis v. Equitable Life Assurance society of the U.S.*, 389 N.W.2d 876, 889 (Minn. 1986); *Zutz v. Nelson*, 788 N.W.2d 58, 61 (Minn. 2010). If an absolute privilege applies, the defamatory statement is privileged, even if it is intentionally false or uttered with malice. Qualified privileges provide immunity unless the privilege is abused. It is a question of law as to whether the privilege exists. *See Lewis v. Equitable Life Assurance Soc'y*, 389 N.W.2d 876, 890 (Minn. 1986); *See Minke v. City of Minneapolis*, 845 N.W.2d 179, 182 (Minn. 2014); *LeBaron v. Minnesota Board of Public Defense*, 499 N.W.2d 39, 41 (Minn. Ct. App. 1993), rev. denied (Minn. June 9, 1993); *Wilson v. Weight Watchers of Upper Midwest, Inc.*, 474 N.W.2d 380, 384 (Minn. Ct. App. 1991), rev. denied (Minn. Oct. 16, 1991).

Anti-SLAPP Immunity

In 1994, Minnesota enacted an anti-SLAPP (Strategic Lawsuit Against Public Participation) statute, M.S.A. §§ 554.01–.05, to "protect citizens and organizations from lawsuits that would chill their right to publicly participate in government." Act of May 5, 1994, ch. 566, 1994 Minn. Laws 895, 895. As noted by the Minnesota Supreme Court in *Leiendecker v. Asian Women United of Minnesota*, 848 N.W.2d 224 (Minn. 2014), anti-SLAPP statutes typically protect the exercise of the public-participation rights of free speech and the right to petition the government. *Citing Equilon Enters., LLC v. Consumer Cause, Inc.*, 52 P.3d 685, 693 (Cal. 2002); *Denton v. Browns Mill Dev. Co.*, 561 S.E.2d 431, 433 (Ga.2002).

The statute provides that "[l]awful conduct or speech that is genuinely aimed in whole or in part at procuring favorable government action is immune from liability, unless the conduct or speech constitutes a tort or a violation of a person's constitutional rights." M.S.A. § 554.03. Upon filing of a motion to dismiss "on the grounds that the claim materially relates to an act of the moving party that involves public participation," M.S.A. § 554.02, subd. 2(3), the statute provides that "the court shall grant the motion and dismiss the judicial claim unless the court finds that the responding party has produced clear and convincing evidence that the acts of the moving party are not immunized from liability under section 554.03." In *Leieindecker*, the supreme court held that the "clear and convincing evidence" standard requires the production of evidence. A plaintiff may not rely solely on the allegations in the compliant to defeat the motion. 848 N.W.2d at 229.

The number of jury instructions is necessitated both by the number of potential issues that may arise in a common law claim, and the significant modification of the common law by the constitutional decisions of the United States Supreme Court, beginning with *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). The special verdict forms following the instructions cover a variety of cases, ranging from claims brought by public officials and figures to private persons who are not involved in matters of legitimate public concern.

The first instruction, CIVJIG 50.10, simply defines a defamatory statement. CIVJIG 50.15 covers publication, including cases where there is a republication of a defamatory statement. CIVJIG 50.20 covers cases where there is a question concerning slander *per se*. It applies in cases where there is an oral or other non-permanent defamatory statement. CIVJIG 50.25 covers the truth issue. It applies in cases where there is a common law defamation claim not subject to the constitutional restrictions established by the United States Supreme Court, in which case the plaintiff has the burden of proving the falsity of the defamatory statement.

Both common law and constitutional privileges may apply in a given case. CIVJIG 50.30 covers common law privileges. There is no jury instruction, however, because the existence of the privilege is a question of law for the court. If there are disputed fact questions that will determine the existence of a privilege, appropriate fact questions may be submitted to the jury. If a qualified privilege attaches, there may be a fact question as to whether the privilege has been abused. In that event, CIVJIG 50.35, which defines common law actual malice, should be used. The United States Supreme Court and the Minnesota Supreme Court have established distinctions between common law malice and malice of the type necessary to overcome a constitutional privilege to defame persons who are public figures or public officials. If a question concerning abuse of the constitutional privilege is applicable to defamation actions brought by corporations, *see Jadwin v. Minneapolis Star and Tribune Co.*, 367 N.W.2d 476, 485–87 (Minn. 1985), appeal after remand, 390 N.W.2d 437 (Minn. Ct. App. 1986), and/or by public figures and officials, then CIVJIG 50.40, covering actual malice as defined by the United States Supreme Court in *New York Times Co. v. Sullivan*, should be used.

CIVJIG 50.45 defines negligence in defamation actions. This instruction applies in cases where the United States Supreme Court's decision in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) applies. In a defamation case brought by a private plaintiff against a media defendant, it is not necessary for the plaintiff to prove *New York Times Co.* actual malice. Instead, a negligence standard applies.

CIVJIG 50.50 and 50.55 cover presumed and actual damages in defamation cases. CIVJIG 50.50 applies to presumed damages. In *Richie v. Paramount Pictures Corp.*, 544 N.W.2d 21 (Minn. 1996), the supreme court held that in cases where defamatory statements involve a matter of public concern, and actual malice is not established, "recovery cannot be based on presumed damages." *Richie v. Paramount Pictures Corp.*, 544 N.W.2d at 26. In cases where no constitutional privilege applies, or in cases where the *New York Times Co. v. Sullivan* actual malice standard applies and is met, presumed damages may be awarded. *See Stokes v. CBS Inc.*, 25 F.Supp.2d 992, 1001–02 (D. Minn. 1998). In cases where *Gertz v. Robert Welch, Inc.* applies, however, only actual damages may be recovered. CIVJIG 50.55 covers actual damages. CIVJIG 50.60 covers special damage. That instruction serves two purposes. It applies in slander cases where the plaintiff is unable to prove slander *per se*. It also applies in defamation cases where the plaintiff is not required to prove special damage, but is entitled to recover for special damages that are proved.

The remaining instruction, CIVJIG 50.65, covers punitive damages. It refers to the punitive damages instruction, CIVJIG 94.10. The commentary explains the cases in which punitive damages will be permitted in a defamation case, including cases where the constitutional privilege is applicable.

USE NOTE

The key to using the jury instructions on defamation is the set of special verdict forms in this category. Use of the special verdict forms will focus attention on the specific instructions that should be used in a defamation case. All defamation cases, whether or not constitutional issues are implicated, involve the same basic elements, but there are variations and additions when constitutional or common law privilege issues arise. The eight special verdict forms address several of these variations. The Committee recommends planning the jury instructions by starting with the special verdict forms and then working back to the relevant instructions. The Use Notes following the special verdict forms note the instructions that correlate with the special verdict questions in each form. Following is a brief description of the special verdict forms.

1. CIVSVF 50.90 is the primary special verdict form for libel cases (claims arising from written words) involving a private plaintiff whose suit does not challenge speech on a matter of public

concern. It establishes the basic elements of defamation. It also includes qualified privilege, which will often arise in private defamation cases.

2. CIVSVF 50.91 is the primary special verdict form for slander cases (claims arising from spoken words). It assumes a private plaintiff/private issue case, but this form could also be used in cases involving public figures or officials or matters of public concern. The slander elements would have to be followed by the issues relevant to those cases established in CIVSVF 50.93, 50.94, or 50.95. The elements of the slander claim would simply be substituted for the elements of libel in the first parts of those special verdict forms.

3. CIVSVF 50.92 applies in a case involving a slander claim that does not fit within one of the categories of slander *per se*.

4. CIVSVF 50.93 covers libel or slander claims involving public officials or figures. It incorporates the actual malice standard from *New York Times Co. v. Sullivan*.

5. CIVSVF 50.94 applies to libel cases involving public officials or figures where a qualified privilege issue is also available and has been invoked. The differing definitions of "actual malice" for purposes of the constitutional standard and the common law standard necessary to overcome a qualified privilege create special problems, which this special verdict form addresses.

6. CIVSVF 50.95 covers a private plaintiff whose claim arises from speech on matters of public concern. It incorporates the standards from *Gertz v. Robert Welch, Inc.*

7. CIVSVF 50.96 covers a plaintiff whose claim arises from speech on matters of public concern, in a case in which a qualified privilege is also available and has been invoked.

8. CIVSVF 50.97 covers the damages issues that will arise. This verdict form will link with the other special verdict forms. The damages questions used will depend on the plaintiff's theory of the case.

CIVJIG 50.10

DEFAMATORY COMMUNICATION

Definition of defamatory statement

A statement or communication is defamatory if it tends to:

1. So harm the reputation of a person that it lowers his or her esteem in the community, or

2. Deter third persons from associating or dealing with him or her, or

3. Injure his or her character, or

4. Subject this person to ridicule, contempt, or distrust, or

5. Degrade or disgrace this person in the eyes of others.

[A statement or communication may be defamatory because (defendant):]

[1. Left out certain facts so the statement conveyed a defamatory meaning.]

[2. Linked statements in a way that conveyed a defamatory meaning.]

[3. Stated an opinion that conveyed defamatory facts.]

USE NOTE

The trial judge must determine as a matter of law whether the alleged statement is capable of a defamatory meaning, and whether reasonable minds may differ on the question of whether a reasonable person would understand the statement as defamatory. If so, the issue of whether the statement is defamatory may be submitted, using this instruction. The last bracketed paragraph should be used in cases where the defamatory meaning is not clear on the face of the statement. In those cases, the trial judge must also perform a screening function in determining whether a defamatory meaning is conveyed, and, if so, whether reasonable minds may differ on the question of whether a reasonable person would understand the statement as defamatory. The general principle that the defamatory meaning must be interpreted in light of the context surrounding the allegedly defamatory statements is not affected by the Minnesota Supreme Court's decision in *Diesen v. Hessburg*, 455 N.W.2d 446, 451–52 (Minn. 1990), in which a plurality of the supreme court held that a public official in a defamation action could not prove falsity by implication when the challenged statements are true.

The instruction uses the term "statement or communication." While the typical defamation case will involve a statement, there are other communications that may be defamatory as well, such as pictures or caricatures. *See* Introductory Note, Elements of Defamation, Defamatory Statement. If a defamatory communication other than a statement is involved, the instruction should be modified accordingly.

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See Introductory Note. The supreme court in *Utecht v. Shopko Department Store*, 324 N.W.2d 652 (Minn. 1982) established the appropriate division of responsibility between judge and jury in defamation cases:

> We have often cautioned that summary judgment is not a substitute for trial . . . . In libel cases a publication may be defamatory on its face; or it may carry a defamatory meaning only by reason of extrinsic circumstances. The question whether a claimed defamatory innuendo is reasonably conveyed by the language used is for the court to determine . . . . If the words are capable of the defamatory meaning, it is for the jury to decide whether they were in fact so understood.

Utecht v. Shopko Department Store, 324 N.W.2d at 653–54 (citations omitted).

In *Schlieman v. Gannett Minnesota Broadcasting, Inc.*, 637 N.W.2d 297, 305 (Minn. Ct. App. 2001), the court of appeals noted CIVJIG 50.10 in stating that context may be considered in determining whether a statement has a defamatory meaning. The court of appeals also concluded that *Diesen v. Hessburg*, 455 N.W.2d 446, 451–52 (Minn. 1990), in which a plurality of the supreme court held that a public official in a defamation action could not prove falsity by implication when the challenged statements are true, "does not modify the general principle that courts must interpret the defamatory-meaning element of a defamation action in light of the context surrounding the alleged defamatory statements." *Schlieman*, 637 N.W.2d at 304–05.

Research References

West's Key Number Digest
Libel and Slander ⚷6 to 10, 124(4)

CIVJIG 50.15

PUBLICATION

Publication

A defamatory statement or communication is published if it is communicated to, and understood by, at least one person other than (plaintiff).

[Intentional publication

A publication is intentional if:

1. It is made for the purpose of communicating the defamatory matter to a person other than (plaintiff), or
2. With knowledge that the defamatory matter is substantially certain to be communicated.]

[Negligent publication

A publication is made negligently if a reasonable person would recognize that the defamatory matter will be communicated to a person other than (plaintiff).]

[Compelled self-publication

Publication can occur in a situation where only (plaintiff) is told the statement and repeats it if:

1. (Plaintiff) was compelled to repeat the defamatory statement or communication, and
2. It was foreseeable to (defendant) that (plaintiff) would be compelled to repeat it.]

USE NOTE

The Restatement (Second) of Torts § 577 (1977), provides that publication must be made intentionally or negligently. The first part of the instruction sets out the standard for publication. The second and third bracketed parts define intent and negligence. The bracketed parts of the instruction covering intentional and negligent publication should be given only where they are actually in issue. In most cases it will be clear that the statement was published intentionally. The last bracketed part applies to cases involving compelled self-publication. That instruction should be given only in cases where the trial judge is satisfied that the doctrine of compelled self-publication is supported by the evidence.

The special verdict forms, CIVSVF 50.90–50.96 ask only whether the statement was published. The forms do not ask whether the statement was published negligently or intentionally, although the forms could be altered accordingly if the means of publication were in issue.

AUTHORITIES

In order for a statement to be considered defamatory, it must be communicated to someone other than the plaintiff. *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 255 (Minn. 1980). In other words, it must be published. The publication element in a defamation action also requires that the statement be understood by the third party. *See Larson v. Krostue*, 110 Minn. 337, 125 N.W. 262 (1910); *Glatz v. Thein*, 47 Minn. 278, 50 N.W. 127 (1891); *Petsch v. St. Paul Dispatch Printing Co.*, 40 Minn. 291, 293–94, 41 N.W. 1034, 1035 (1889); Note, Minnesota Defamation Law and the Constitution: First Amendment Limitations on the Common Law Torts of Libel and Slander, 3 Wm. Mitchell L.Rev. 81, 83 (1977).

In most cases, a publication does not occur when a defendant communicates a statement to a plaintiff who in turn communicates it to a third person. In *Lewis v. Equitable Life Assurance Soc.*, 389 N.W.2d 876 (Minn. 1986), however, the supreme court recognized that the publication requirement can be satisfied through compelled self-publication. The court stated that:

> [W]e hold that in an action for defamation, the publication requirement may be satisfied where the plaintiff was compelled to publish a defamatory statement to a third person if it was foreseeable to the defendant that the plaintiff would be so compelled.

Lewis v. Equitable Life Assurance Soc., 389 N.W.2d at 888. *See also Oaks Gallery and Country Store-Winona, Inc. v. Lee Enterprises, Inc.*, 613 N.W.2d 800, 803, (Minn. Ct. App. 2000). The rule may be subject to a statutory limitation. *See* M.S.A. § 181.933 (an employee who requests from an employer the reasons for termination may not make any such communication or statement furnished by the employer the subject of a defamation claim against the employer).

The Restatement (Second) of Torts § 577 (1977) defines publication of defamatory matter as “its communication intentionally or by a negligent act to one other than the person defamed.” A comment to section 577 states that "[s]ince publication requires that the defamatory matter be communicated to a third person, it is necessary not only that the defamatory matter be brought to the attention of a third person but that he understand its defamatory significance." Restatement (Second) of Torts § 577 cmt. c.

Questions concerning publication may arise when defamatory statements are communicated to members of a corporation. In *Frankson v. Design Space International*, 394 N.W.2d 140 (Minn. 1986), the supreme court considered the publication issue in the context of a defamation claim brought by a former corporate employee against his employer. The termination letter received by the plaintiff was distributed to a personnel file and two officers. The supreme court held that this was a publication for purposes of the defamation action. *Frankson v. Design Space International*, 394 N.W.2d at 144. However, although there may be publication, there may also be a qualified privilege protecting such communications. *E.g., Frankson v. Design Space International*, 394 N.W.2d 140 (Minn. 1986); *see Lewis v. Equitable Life Assurance Soc.*, 389 N.W.2d 876, 889 (Minn. 1986); *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 256–57 (Minn. 1980).

Research References

West's Key Number Digest
Libel and Slander ⚷23, 124(1)

CIVJIG 50.20

SLANDER *PER SE*

[The Committee recommends no instruction.]

USE NOTE

In a slander case where there is a fact question as to whether the defamatory statement fits within one of the common law categories of slander *per se*, the Special Verdict Form 50.91 should be modified to encompass the relevant fact issues. Those fact issues are whether the statement:

1. Accuses the plaintiff of having committed a crime involving moral turpitude;
2. Accuses the plaintiff of having a loathsome disease;
3. Accuses the plaintiff of having committed serious sexual misconduct; or
4. Affects the plaintiff in the plaintiff's business, trade, profession, office, or calling.

The question of what constitutes a crime involving moral turpitude, a loathsome disease, or serious sexual misconduct are typically questions of law for the court. If the defendant made the statement, there may be no issue to submit to the jury.

AUTHORITIES

The basic distinction between libel and slander is that libel is written and slander is oral. Dan B. Dobbs et al., The Law of Torts 2d § 519 (2011). The Restatement (Second) of Torts § 568 (1977) defines the distinction as follows:

> (1) Libel consists of the publication of defamatory matter by written or printed words, by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words.
>
> (2) Slander consists of the publication of defamatory matter by spoken words, transitory gestures or by any form of communication other than those stated in Subsection (1).
>
> (3) The area of dissemination, the deliberate and premedi-

tated character of its publication and the persistence of the defamation are factors to be considered in determining whether a publication is a libel rather than a slander.

Libel will include "not only writing but all forms of communications embodied in some physical form such as movie film or videotapes, and mass communications through radio broadcasts even if they are not produced from a written script." Dan B. Dobbs et al., The Law of Torts 2d § 534 (2011).

The Minnesota Supreme Court distinguishes between libel and slander. Under the Minnesota approach, all libels are actionable *per se*. *Advanced Training Sys., Inc. v. Caswell Equip. Co., Inc.*, 352 N.W.2d 1, 9 (Minn. 1984). In Minnesota law, the phrase "libel per se" means statements that are defamatory as a matter of law. *Advanced Training Sys., Inc. v. Caswell Equip. Co., Inc.*, 352 N.W.2d 1, 9 (Minn. 1984). The term is not used in Minnesota to distinguish between libels that are actionable *per se* and libels per quod that are not actionable without proof of special damage.

However, slander is not actionable without proof of special damages unless the defamatory statement falls within one of the categories of slander *per se*. There are four categories of slander *per se* that have been recognized by the courts. They are defamatory statements that (1) affect a person in his business, trade, or profession; (2) impute a loathsome disease to the plaintiff; (3) impute unchastity to a woman; and (4) charge a crime, or a crime involving moral turpitude. *See Anderson v. Kammeier*, 262 N.W.2d 366, 372 (Minn. 1977); *see also Larson v. R.B. Wrigley Co.*, 183 Minn. 28, 29, 235 N.W. 393, 394 (1931) (stating that two classes of words are actionable *per se*: (1) words charging the commission of a crime involving moral turpitude, and (2) words that directly disparage and tend to prejudice and injure a person in his office, profession, trade, or business). In *Advanced Training Sys., Inc. v. Caswell Equip. Co., Inc.*, 352 N.W.2d 1, 9, n. 1 (Minn. 1984), the court noted the slander *per se* categories of "imputation of crime, loathsome disease, defamation affecting business, or unchastity in a woman."

1. Words Charging the Commission of a Crime. In *Anderson v. Kammeier*, 262 N.W.2d 366, 372 (Minn. 1977), the supreme court affirmed a trial court finding that calling the plaintiff a "draft dodger" charged him with violation of the selective service laws. The standard for slander of this type is not well-defined in Minnesota. The finding of slander *per se* for a selective service violation in *Anderson* may well be less than a crime involving "moral turpitude." The generality of the standard has been acknowledged in Prosser and Keeton. *See* W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on the Law of Torts § 112 (5th ed. 1984). Prosser and Keeton resolve the cases as follows:

The idea toward which the courts obviously have been struggling is

> that the imputation is to be actionable without proof of damages only if it involves a major social disgrace, which might very well be the ultimate test.

Id. at 789.

2. Loathsome Disease. There are no Minnesota cases specifically involving the loathsome disease category. Prosser and Keeton indicate the general limitations the courts have placed on the category:

> From the beginning it was limited to cases of venereal disease, with a few instances of leprosy, and it was not applied to more contagious and equally repugnant disorders such as smallpox. The basis of the distinction was in all probability the fact that syphilis and leprosy were regarded originally as permanent, lingering and incurable, while from smallpox one either recovered or died in short order. The advance of medical science tended to keep the exception within its original limits; and today accusations of insanity or of tuberculosis or other communicable diseases are not included. Furthermore, since there would not be the same social avoidance of one who had recovered, it is well established that the imputation that the plaintiff has had even a venereal disease in the past is not sufficient without proof of damage.

Id. at 790.

3. Unchastity (Serious Sexual Misconduct). The Minnesota Supreme Court has noted that slander *per se* includes the imputation of unchastity to a woman. *See Advanced Training Systems, Inc. v. Caswell Equipment Co., Inc.*, 352 N.W.2d 1, 9 n. (Minn. 1984); *Anderson v. Kammeier*, 262 N.W.2d 366, 372 (Minn.1977). The imputation of unchastity to a woman is actionable without regard to whether it charges the woman with a crime. *See Ernster v. Eltgroth*, 149 Minn. 39, 40, 182 N.W. 709, 710 (1921); *Radke v. Kolbe*, 79 Minn. 440, 441–42, 82 N.W. 977, 977–98 (1900), although there may be an overlap between an imputation of serious sexual misconduct and criminal conduct. *See Longbehn v. Schoenrock*, 727 N.W.2d 153, 160 (Minn. Ct. App. 2007); Restatement (Second) of Torts § 574 cmt. d (1977).

4. Office, Profession, Trade, or Business. For words to fit this category, they "must be peculiarly harmful to the person in his business. General disparagement is insufficient. It must depend on the occupation and the particular statement. In other words, the remarks must relate to the person in his professional capacity and not merely as an individual without regard to his profession." *Anderson v. Kammeier*, 262 N.W.2d 366, 372 (Minn. 1977); *see High v. Supreme Lodge*, 214 Minn. 164, 167, 7 N.W.2d 675, 678 (1943). As examples, it is actionable to call an attorney a "shyster," *see Gribble v. Pioneer Press Co.*, 34 Minn. 342, 25 N.W. 710 (1885), but not to charge an attorney with being habitually slow in the payment of his debts. *See McDermott v. Union Credit Co.*, 76 Minn. 84, 78 N.W. 967, rev'd, 76 Minn. 84, 79 N.W. 673 (1899). In the first situation, the statement affects the attorney's professional capacity, but in the second, the statement does not. *See* Anderson, 262 N.W.2d at 372, n. 3.

In *Anderson*, the defendant stated that the plaintiff "should not be trusted" and would "stab anyone in the back." The supreme court held that the statements were slander *per se* because they clearly contested the honesty of the plaintiff in the operation of his business affairs. *Anderson*, 262 N.W.2d at 372.

In the case of a corporation, statements that "tend to injure the credit, property, or business" of the corporation are "defamatory per se." *See Imperial Developers, Inc. v. Seaboard Surety Co.*, 518 N.W.2d 623, 627 (Minn. Ct. App. 1994).

Research References

West's Key Number Digest
Libel and Slander ⚷7 to 10, 33, 124(4)

CIVJIG 50.25

TRUTH

PART A

Definition of "false"

Question ____ asks whether the statement (____) was false.

A statement or communication is false if it is not substantially accurate. Substantial accuracy does not require every word to be true. A statement or communication is substantially accurate if its substance or gist is true.

[A statement or communication is also false if the implication of the statement is false.]

PART B

Definition of "true"

Question ____ asks whether the statement or communication (____) was true.

A statement or communication is true if it is substantially accurate. Substantial accuracy does not require every word to be true. A statement or communication is substantially accurate if its substance or gist is true.

[A statement or communication is also true if the implication of the statement or communication is true.]

USE NOTE

In cases involving defamation claims by public officials or figures, or by private figures involved in matters of public concern, the plaintiff has the burden of proving a false statement of fact. In that event, the instruction in Part A should be given. In private plaintiff/private matter defamation cases, the Minnesota Supreme Court has not clearly held that the plaintiff in a private defamation case bears the burden of proof on the truth issue. Given the uncertainty on that issue, the trial court will have to determine whether the plaintiff or defendant has the burden of proof on the truth issue in a private person/private issue defamation case. If the trial court determines that the plaintiff has the burden of proof on the truth issue, the instruction in Part A should be given. If the trial court determines that the defendant has the burden of proof on the truth issue, the instruction in Part B should be given.

Minnesota law is unclear on the right of a person to recover for defamation by implication. The Minnesota Supreme Court has indicated that a public official or figure may not recover for defamation by implication. Other courts, applying Minnesota law, have recognized the right of a private person not involved in a public issue to recover for defamation by implication under appropriate circumstances. In *Michaelis v. CBS, Inc.*, 119 F.3d 697 (8th Cir. 1997), the Eighth Circuit repeated its conclusion in *Toney v. WCCO Television*, 85 F.3d 383 (8th Cir. 1996) that Minnesota recognizes a cause of action for defamation by implication, notwithstanding the Minnesota Supreme Court's statement in *Diesen* that it did not recognize such an action where the defamation is brought by a public official. 119 F.3d at 701. The court noted both types of defamation by implication, one where there is a juxtaposition of facts so as to imply a defamatory connection between them, and, in the other, an omission of facts. "In an implied defamation case, a defendant does not avoid liability by simply establishing the truth of the individual statement. Instead, the defendant must also defend the juxtaposition of the two statements or the omission of certain facts." 119 F.3d at 701.

If there is defamation by implication, the implication of the statement must be true, if the defendant has the burden of proof on the defense of truth. If recovery for defamation by implication is allowed when the defamation claim is brought by a public official, the implication of the statement must be proved to be false.

For a discussion of the impact of defamation by implication on the issue of whether a defamatory meaning may attach to a statement, *see* CIVJIG 50.10, Use Note and Authorities.

AUTHORITIES

Burden of Proof. In cases where a defamation claim is brought by a public official or figure, or by a private figure for a defamatory statement that involves a matter of public concern, the Supreme Court of the United States has held that the burden of proof shifts to the plaintiff to prove the falsity of the statement. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776–777, 106 S.Ct. 1558, 1563, 89 L.Ed.2d 783, 793 (1986). The plaintiff "cannot succeed in meeting the burden of proving falsity by showing only that the statement is not literally true in every detail. If the statement is true in substance, inaccuracies of expression or detail are immaterial." *Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d 437, 441 (Minn. Ct. App. 1986).

There has been uncertainty in the Minnesota cases concerning the burden of proof in defamation cases that do not involve public officials, figures, or issues. In *Diesen v. Hessburg*, 455 N.W.2d 446, 448 (Minn. 1990), the supreme court said that "[g]enerally, a plaintiff must prove publication of a false and defamatory statement to prevail in a libel action, with truth being an affirmative defense to such a claim." The court cited Prosser and Keeton in support of that proposition. The full quote in the treatise is as follows:

> To create liability for defamation, there must be publication of matter that is both defamatory and false. The well-settled common law rule prior to decisions by the United States Supreme Court related to the constitutional privilege to defame was that truth is an affirmative defense which the defendant must plead and prove. *Thus, under the common law rule, the defamatory statement is regarded as false unless the defendant proves truth.* It has been said that meeting the constitutional requirements regarding the necessity for proof of at least negligence with respect to the truth or falsity of a defamatory statement makes it necessary for the plaintiff to allege and prove the falsity of the communication. The basis for this position is that the Supreme Court of the United States, in holding that the plaintiff must establish some kind of fault with respect to the issue of truth or falsity, has by implication allocated the issue of falsity to the plaintiff. But there can be two answers to this. In the first place, the constitutional privilege to defame may not extend to defamatory utterances privately made about private persons. In the second place, there is no inconsistency in assuming falsity until defendant publisher proves otherwise and requiring the plaintiff to prove negligence or recklessness with respect to the truth or falsity of the imputation. There is, in other words, nothing inconsistent about requiring the defendant to prove truth if absolute protection is to be provided for a defamatory imputation while at the same time requiring the plaintiff to prove that the defendant acted negligently or recklessly in publishing the statement on the basis of the information that was available to him. The situation is very much the same as that which has existed historically under the common law when the defendant publishes a defamatory statement about the plaintiff on a privileged occasion. If he wished to escape altogether, he could prove truth. He cold also plead a privilege, and if he established circumstances giving rise to a privilege, then the plaintiff would find it necessary to show some kind of fault as a prerequisite to recovery. So, if the defendant publishes a defamatory statement on a constitutionally privileged occasion, he can either prove truth or require the plaintiff to prove fault. The mere fact that it may be difficult to establish recklessness or negligence without some evidence of falsity does not mean that fault in reporting something to be true cannot be found in the absence of an affirmative finding that the statement was true.

W. Page Keeton, Dan B. Dobbs, Robert E. Keeton & David G. Owen, Prosser and Keeton on Torts, § 116, at 839–840 (5th ed. 1984) (emphasis added).

In *Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d 437 (Minn. Ct. App. 1986), the court of appeals said:

> At common law, a defamatory statement was presumed to be false. Truth was an absolute, affirmative defense. See *Jadwin*, 367 N.W.2d at 480; Restatement (Second) of Torts § 581A and comment b (1977) . . . .

See also Lindgren v. Harmon Glass Co., 489 N.W.2d 804, 810 (Minn. Ct. App. 1992), rev. denied (Minn. Oct. 20, 1992); *Michaelson v. Minnesota Min. & Mfg. Co.*, 474 N.W.2d 174, 181 (Minn. Ct. App. 1991), review granted (Minn. Sept. 25, 1991), aff'd without opinion, 479 N.W.2d 58 (Minn. 1992); *Foley v. WCCO Television, Inc.*, 449 N.W.2d 497, 501 (Minn. Ct. App. 1989), rev. denied (Minn. Feb. 9, 1990), cert. denied 497 U.S. 1038, 110 S.Ct. 3302, 111 L.Ed.2d 811 (1990).

In *Rouse v. Dunkley & Bennett, P.A.*, 520 N.W.2d 406 (Minn. 1994), however, a case involving a legal malpractice claim by the plaintiff against a law firm that allegedly failed to assert a defamation claim against the plaintiff's former employer, the supreme court made the following statement in discussing the defamation claim:

> The elements of defamation require the plaintiff to prove that a statement was false, that it was communicated to someone besides the plaintiff, and that it tended to harm the plaintiff's reputation, and to lower him in the estimation of the community. *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 255 (Minn. 1980), citing Restatement (Second) of Torts §§ 558–559 (1977).

520 N.W.2d at 410.

In *Jeffries v. Metro-Mark, Inc.*, 45 F.3d 258, 261 (8th Cir. 1995), cert. denied 516 U.S. 830, 116 S.Ct. 102, 133 L.Ed.2d 56 (1995), rehearing denied 516 U.S. 1018, 116 S.Ct. 584, 133 L.Ed.2d 506 (1995), the Eighth Circuit cited *Rouse* in holding that the plaintiff has the burden of proof on the truth issue:

> Mr. Jeffries argues that under Minnesota law with respect to defamation claims, it is the defendant who has the burden of proving that the statements in question were true, rather than the plaintiff's having to prove that the statements in question were false. The Minnesota Supreme Court, however, has recently reiterated that the "elements of defamation require the plaintiff to prove that a statement was false." *Rouse v. Dunkley and Bennett, P.A.*, 520 N.W.2d 406, 410 (Minn. 1994); see also *Nadeau v. County of Ramsey*, 277 N.W.2d 520, 523 (Minn. 1979).

W. Page Keeton, Dan B. Dobbs, Robert E. Keeton & David G. Owen, Prosser and Keeton on Torts, § 116 (5th ed. 1984).

In, Richie v. Paramount Pictures Corp., 544 21, 25 (Minn. 1996) and *Ferrell v. Cross*, 557 N.W.2d 560, 565 (Minn. 1997), the supreme court reiterated the statement that the plaintiff has the burden of proof in defamation cases. *Richie* involved a claim by a private figure involved in a public issue, but the burden of proof issue was not directly presented to the court. In *Ferrell*, a private defamation case, the court again stated that the plaintiff is required to prove "that the alleged statements were made, that they were communicated to someone other than herself, that they were false, and that, as a result, her reputation was harmed." There was no direct consideration of the burden of proof issue, however.

In *Benson v. Northwest Airlines, Inc.*, 561 N.W.2d 530, 537 (Minn. Ct. App. 1997), the court of appeals directly considered the burden of proof issue in a private defamation case:

> To prove his defamation claims plaintiff must prove each of the following . . . by the greater weight of the evidence. One, the statement must be defamatory. Two, the statement must be false. Three, the statement must refer to the plaintiff; and four, the statement must be published . . . . The plaintiff must also prove that the alleged defamatory statements are false. True statements however disparaging do not support a claim of defamation. Minor inaccuracies in the allegedly defamatory statements will not satisfy the plaintiff's burden of proving falsity.

The plaintiff argued that the trial court erroneously shifted the burden of proving the truth of the statement to him. The court rejected the argument, stating that "[i]n private plaintiff/private matter defamation cases, the Minnesota Supreme Court has placed the burden of establishing each element of the claim on the plaintiff." The court cited *Ferrell*, *Rouse*, and *Jeffries* in support of its conclusion.

Most recently, the supreme court stated in *McKee v. Laurion*, 825 N.W.2d 725 (Minn. 2013) that to establish the elements of a defamation case the plaintiff must prove that "the statement is false," but the court noted in the next paragraph that "[t]ruth is a complete defense to a defamation action."

Absent a specific holding of the Minnesota Supreme Court on the burden of proof on the truth issue, and in light of conflicting decisions of the court of appeals prior to the appearance of the dictum in the Minnesota Supreme Court opinions, the trial court will have to determine whether the plaintiff or defendant has the burden of proof on the truth issue in a private person/private issue defamation case. If the trial court determines that the plaintiff has the burden of proof on the truth issue, the instruction in Part A of this instruction should be given. If the trial court determines that the defendant has the burden of proof on the truth issue, the instruction in Part B should be given.

Defamation by Implication. In *Diesen v. Hessburg*, 455 N.W.2d 446, 451 (Minn. 1990), cert. denied, 498 U.S. 1119, 111 S.Ct. 1071, 112

L.Ed.2d 1177 (1991), the Minnesota Supreme Court appeared to hold that defamation by implication is not recognized in cases involving defamation claims brought by public officials. The court said that it concurred with the other jurisdictions that have "specifically declined to allow a public official to prove falsity by implication where the challenged statements were true."

In *Michaelis v. CBS, Inc.*, 119 F.3d 697 (8th Cir. 1997), the Eighth Circuit repeated its conclusion in *Toney v. WCCO Television*, 85 F.3d 383 (8th Cir. 1996) that Minnesota recognizes a cause of action for defamation by implication, notwithstanding the Minnesota Supreme Court's statement in *Diesen* that it did not recognize such an action where the defamation is brought by a public official. 119 F.3d at 701. The court noted both types of defamation by implication, one where there is a juxtaposition of facts so as to imply a defamatory connection between them, and, in the other, an omission of facts. "In an implied defamation case, a defendant does not avoid liability by simply establishing the truth of the individual statement. Instead, the defendant must also defend the juxtaposition of the two statements or the omission of certain facts." 119 F.3d at 701.

In *Schlieman v. Gannett Minnesota Broadcasting, Inc.*, 637 N.W.2d 297, 305 (Minn. Ct. App. 2001), the court of appeals noted CIVJIG 50.10 in stating that context may be considered in determining whether a statement has a defamatory meaning. The court also concluded that *Diesen v. Hessburg*, 455 N.W.2d 446, 451–52 (Minn. 1990), in which a plurality of the supreme court held that a public official in a defamation action could not prove falsity by implication when the challenged statements are true, "does not modify the general principle that courts must interpret the defamatory-meaning element of a defamation action in light of the context surrounding the alleged defamatory statements." *Schlieman*, 637 N.W.2d at 304–05.

In *McKee v. Laurion*, 825 N.W.2d 725 (Minn. 2013), a case involving allegedly defamatory statements made by the defendant concerning an encounter with the plaintiff physician who had treated the defendant's father, the supreme court stated:

> Truth is a complete defense to a defamation action and "true statements, however disparaging, are not actionable." . . . As a general rule, the truth or falsity of a statement is a question for the jury. . . . If the statement is true in substance, minor inaccuracies of expression or detail are immaterial. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516, 111 S.Ct. 2419, 115 L.Ed.2d 447 (1991) (explaining that the common law approach to falsity in the context of libel "overlooks minor inaccuracies and concentrates upon substantial truth"); see also *Clancy v. Daily News Corp.*, 202 Minn. 1, 11, 277 N.W. 264, 269 (1938) (characterizing the question of truth as "[w]hether the publications were substantially true"); Restatement (Second) of Torts § 581A cmt. f (1977) ("Slight inaccuracies of expression are immaterial provided that the defamatory charge is true in substance."). "Minor inaccuracies do not amount to

> falsity so long as 'the substance, the gist, the sting, of the libelous charge [is] justified.' " *Masson*, 501 U.S. at 517, 111 S.Ct. 2419 (quoting *Heuer v. Kee*, 15 Cal.App.2d 710, 59 P.2d 1063, 1064 (1936)). A statement is substantially true if it would have the same effect on the mind of the reader or listener as that which the pleaded truth would have produced. Id. The plaintiff has the burden of proving falsity in order to establish a successful defamation claim . . . .

McKee v. Laurion, 825 N.W.2d 725, 730 (Minn. 2013).

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CIVJIG 50.30

ABSOLUTE AND QUALIFIED PRIVILEGES

[The Committee recommends no instruction.]

USE NOTE

The existence of the privilege is a question of law for the court. It is the plaintiff's burden to overcome the qualified privilege by proof of common law "actual malice." Common law actual malice is covered in CIVJIG 50.35.

In cases where there is a fact issue relating to the existence or abuse of a privilege, the fact question can be submitted to the jury as an appropriate special verdict question. If, for example, there is a fact question as to whether the defendant had a reasonable basis for making a defamatory statement in the course of an investigation of employee misconduct, a factual finding on that issue by special verdict question could be factored into the court's determination of whether the qualified privilege applies. *Landers v. National Railroad Passenger Corp.*, 345 F.3d 669, 673 (8th Cir. 2003), citing *Wirig v. Kinney Shoe Corp.*, 461 N.W.2d 374, 380 n.4 (Minn. 1990).

AUTHORITIES

The Minnesota Supreme Court has recognized two types of privileges, absolute and qualified. *Minke v. City of Minneapolis*, 845 N.W.2d 179, 182 (Minn. 2014); *Zutz v. Nelson*, 788 N.W.2d 58, 61 (Minn. 2010). As noted by the court in *Minke*:

> Both privileges exist because "statements made in particular contexts or on certain occasions should be encouraged despite the risk that the statements might be defamatory." . . . Absolute privilege bars liability for even "intentionally false statements, coupled with malice," while qualified privilege bars liability only if the "defamatory statements are publicized in good faith and without malice." (Citations omitted).

845 N.W.2d at 182 (citations omitted).

If an absolute privilege applies, the defamatory statement is privileged, even if it is intentionally false or uttered with malice. Qualified privileges provide immunity unless the privilege is abused. It is a question of law as to whether the privilege exists. *See Minke v. City of Minneapolis*, 845 N.W.2d 179, 182 (Minn. 2014); *Lewis v. Equitable Life Assurance Soc'y*, 389 N.W.2d 876, 890 (Minn. 1986); *LeBaron v. Minnesota Board of Public Defense*, 499 N.W.2d 39, 41 (Minn. Ct. App. 1993), rev. denied (Minn. June 9, 1993); *Wilson v. Weight Watchers of Upper Midwest, Inc.*, 474 N.W.2d 380, 384 (Minn. Ct. App. 1991), rev. denied (Minn. Oct. 16, 1991). If there are fact questions concerning the existence of an element of the privilege, however, those questions may be submitted to the jury pursuant to appropriate special verdict questions. *Landers v. National Railroad Passenger Corp.*, 345 F.3d 669, 673 (8th Cir. 2003), *citing Wirig v. Kinney Shoe Corp.*, 461 N.W.2d 374, 380 n.4 (Minn. 1990).

In *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252 (Minn. 1980), the supreme court stated the elements of a qualified privilege:

> Ever since *Hebner v. Great Northern Ry.*, 78 Minn. 289, 292, 80 N.W. 1128, 1129 (1899), the following have been the elements and effects of conditional privilege in Minnesota:
>
> The law is that a communication, to be privileged, must be made upon a proper occasion, from a proper motive, and must be based upon reasonable or probable cause. When so made in good faith, the law does not imply malice from the communication itself, as in the ordinary case of libel. Actual malice must be proved, before there can be a recovery, and in the absence of such proof the plaintiff cannot recover.

Stuempges, 297 N.W.2d at 256–257. *See also Ferrell v. Cross*, 557 N.W.2d 560, 565 (Minn. 1997); *Wirig v. Kinney Shoe Corp.*, 461 N.W.2d 374, 380 (Minn. 1990); *Lewis v. Equitable Life Assurance Soc.*, 389 N.W.2d 876, 889 (Minn. 1986); *Strauss v. Thorne*, 490 N.W.2d 908, 912 (Minn. Ct. App. 1992); *Wilson v. Weight Watchers*, 474 N.W.2d 380, 383 (Minn. Ct. App. 1991).

In *Stuempges*, the court held that there was a qualified privilege for employers to communicate information about former employees:

> [A]n employer called upon to give information about a former employee should be protected so that he can give an accurate assessment of the employee's qualifications. It is certainly in the public interest that this kind of information be readily available to prospective employers, and we are concerned that, unless a significant privilege is recognized by the courts, employers will decline to evaluate honestly their former employees' work records.

Stuempges, 297 N.W.2d at 257. *See also Bauer v. State*, 511 N.W.2d 447, 449–50 (Minn. 1994); *Lewis v. Equitable Life Assurance Soc.*, 389 N.W.2d 876, 889–90 (Minn. 1986); *Bolton v. Department of Human Services*, 540 N.W.2d 523 (Minn. 1995); *Brooks v. Doherty, Rumble & Butler*, 481 N.W.2d 120, 124–25 (Minn. Ct. App. 1992).

Statements made during the investigation or punishment of employee misconduct are generally privileged. *Rudebeck v. Paulson*, 612 N.W.2d 450 (Minn. Ct. App. 2000), rev. denied (Minn. Sept. 13, 2000).

In *Wirig v. Kinney Shoe Corp.*, 461 N.W.2d 374, 380–81 (Minn. 1990), the supreme court, in the course of determining whether a qualified privilege applied to an employer's accusation of theft, said:

> We believe that an employer who takes no steps to investigate but relies entirely on accusations either made by employees who may be biased or on second-hand hearsay with no identification of sources, has not acted as a reasonably prudent person and lacks probable or reasonable grounds for making a potentially defamatory statement. Therefore, we hold as a matter of law that Kinney did not enjoy a qualified privilege.

In *Rudebeck*, the court of appeals said that it did "not interpret this to mean that a mere assertion that the employer conducted an investigation will suffice; instead, the court will examine the precise nature and extent of the investigation to assess the facts supporting the defamatory allegations and the efforts the employer made to ascertain their accuracy." 612 N.W.2d at 454.

The supreme court has typically "found reasonable or probable grounds for making potentially defamatory statements when the employee has admitted some wrongdoing and the employer has investigated the allegations." *Wirig v. Kinney Shoe Corp.*, 461 N.W.2d 374, 380 (Minn. 1990); *see also Cox v. Crown CoCo, Inc.*, 544 N.W.2d 490, 498 (Minn. Ct. App. 1996). "Whether the employer had a proper purpose and whether an occasion is a proper one upon which to recognize a privilege are questions of law for the court to decide . . . . Generally, the question of whether the employer had reasonable and probable grounds for making the statement is also one of law for the court, 'unless the evidence' permits of more than one conclusion, 'then the question becomes one of fact for the jury.'" *Cavanaugh v. Burlington Northern Railroad Co.*, 941 F.Supp. 872, 879 (D.Minn. 1996) (citations omitted); *see also Elstrom v. Independent School Dist. No. 270*, 533 N.W.2d 51, 55 (Minn. Ct. App. 1995), rev. denied (Minn. July 27, 1995). Communications that are made between an employer's agents during the course of an investigation or in punishing employee misconduct are made upon a proper occasion and for a proper purpose. *Ferrell v. Cross*, 557 N.W.2d 560, 565 (Minn. 1997), *citing McBride v. Sears, Roebuck & Co.*, 306 Minn. 93, 97, 235 N.W.2d 371, 374 (1975).

In *Minke v. City of Minneapolis*, 845 N.W.2d 179, 184 (Minn. 2014) the court held that a police sergeant's allegedly defamatory statements to a prospective employer who was conducting a background check were subject to a qualified rather than absolute privilege. In *Zutz v. Nelson*, 788 N.W.2d 58, 67 (Minn. 2010), the court noted that it has "declined to extend absolute privilege from defamation liability to members of subordinate elected government bodies such as city councils and county boards." Given that refusal, the court declined to extend an absolute privilege to an appointed watershed district board. *Id.* at 62. The court also noted that it was unnecessary for it to "decide the issue of whether to extend an absolute privilege to city councils and county boards." *Id.* at 63.

The Minnesota Supreme Court has also recognized qualified privileges in other contexts. *See, e.g., Friedell v. Blakely Printing Co.*, 163 Minn. 226, 229, 203 N.W. 974, 975 (1925) (a communication that is made in good faith concerning a subject matter in which the communicating party has an interest, or in which the communicating party has a duty, is privileged if it is made to a person who has a corresponding duty or interest); *Patmont v. International Christian Missionary Ass'n*, 142 Minn. 147, 148, 171 N.W. 302, 302 (1919) (a religious corporation that maintained a bible college and church had a privilege to direct an investigation of the dean of the college after hearing of derogatory statements about the dean, and to make reports on its corporate records and call the attention of its officers to the problem); *Hansen v. Hansen*, 126 Minn. 426, 427, 148 N.W. 457, 457 (1914) (father of student privileged in sending letter to superintendent of schools complaining of improprieties by another student during school); *Froslee v. Lund's State Bank*, 131 Minn. 435, 438, 155 N.W. 619, 620 (1915) (privilege to protect the interest of others; defendant privileged to issue a warning of the plaintiff's bad credit to a person who appeared likely to deal with the plaintiff); *Peterson v. Steenerson*, 113 Minn. 87, 88, 129 N.W. 147, 148 (1910) (communication in the public interest; communication by one public official to another in discharge of the official's duty is privileged).

In *Nixon v. Dispatch Printing Co.*, 101 Minn. 309, 311–12, 112 N.W. 258, 258 (1907), the Minnesota Supreme Court adopted a fair and accurate reporting privilege in the context of judicial proceedings. In *Moreno v. Crookston Times Printing Co.*, 610 N.W.2d 321, 332 (Minn. 2000), the court adopted the Restatement (Second) of Torts § 611 (1976) as the appropriate formulation of the privilege for reports of public proceedings, and applied it to city council proceedings. Section 611 reads as follows:

> The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgment of the occurrence reported.

The privilege is somewhat broader in scope than the Restatement's conditional privileges. The purpose of the privilege is to guarantee "that the public interest is served by the dissemination of information about events occurring at public proceedings and public meetings." 610 N.W.2d. at 331, *citing* Restatement (Second) of Torts § 611 cmt. a.

The privilege rests on two bases. The first is that a fair and accurate report simply relays to the public information that would be available had the reader been present. The second is the obvious public interest in publicizing public affairs.

The privilege may be lost if the report is not a fair and accurate representation of the proceedings or meetings.

The supreme court accepted Restatement (Second) of Torts § 611 cmt. b as the relevant law for purposes of determining the relationship of the fair and accurate reporting privilege to any applicable constitutional standards. The comment reads as follows:

> The Constitution is now held to require the plaintiff in an action for defamation to show that the defendant, in publishing a false and defamatory communication concerning him, was at fault regarding the injurious character of the statement. If the plaintiff is a public official or a public figure, he must show that the defendant knew of the falsity and defamatory character of the statement or acted with reckless disregard toward these aspects of the statement . . . . If the plaintiff is a private person, he must show the existence of fault amounting at least to negligence in regard to the falsity and the defamatory character of the statement . . . . The privilege stated in this Section permits a person to publish a report of an official action or proceeding or of a public meeting that deals with a matter of public concern, even though the report contains what he knows to be a false and defamatory statement. The constitutional requirement of fault is met in this situation by a showing of fault in failing to do what is reasonably necessary to insure that the report is accurate and complete or a fair abridgment.

The supreme court noted that the fair and accurate reporting privilege is broad, but it is "balanced by a narrow application":

> First, this protection only applies to reports of public proceedings. Second, the report must be either an accurate and complete report of events at the proceeding or a fair abridgment thereof. Comment f notes that a report cannot be edited in such a manner as to misrepresent the proceeding and become misleading . . . . A reporter also may not make additional comments, not part of the meeting, that would convey a defamatory impression or "impute corrupt motives to any one, [or] . . . indict expressly or by innuendo the veracity or integrity of any of the parties." . . .

610 N.W.2d at 331–32.

The court summarized its holding:

> In *Nixon*, we recognized a privilege for the fair and accurate reporting of a judicial proceeding. The same policy considerations found in Nixon support extending that privilege to fair and accurate reports of legislative proceedings as well, including city council meetings. Also, our legislature has stated that, in the criminal context, the policy objectives of a fair and accurate reporting privilege are furthered by protecting such reports from challenges of common law malice. See Minn. Stat. § 609.675, advisory committee cmt. (1964). We believe that the policy objectives of the fair and accurate reporting privilege warrant such protection in the civil context as well. Accordingly, we conclude that the fair and accurate

> reporting privilege extends to protect the accurate and complete report or a fair abridgment of events that are part of the regular business of a city council meeting. This privilege will not be defeated by a showing of common law malice, but is defeated by a showing that the report is not a fair and accurate report of that proceeding. The Supreme Court's decision in Sullivan and Gertz and our subsequent decisions should then be used to determine the standard of care required by a publisher to ensure the fairness and accuracy of such a report.

610 N.W.2d at 332–33.

An absolute privilege applies to statements made in the course of legislative, judicial, and quasi-judicial proceedings. *See Minke v. City of Minneapolis*, 845 N.W.2d 179, 182 (Minn. 2014); *Jenson v. Olson*, 273 Minn. 390, 391–92, 141 N.W.2d 488, 490 (1966) (civil service hearing is quasi-judicial, and witness' statements are privileged); *Rolfe v. Noyes Bros. & Cutler*, 157 Minn. 443, 445, 196 N.W. 481, 482 (1923) (privilege for defamatory statement in lawsuit complaint); *Peterson v. Steenerson*, 113 Minn. 87, 89, 129 N.W. 147, 147–48 (1910) (defamatory statement in public officer's report is qualifiedly privileged); *Dorn v. Peterson*, 512 N.W.2d 902, 906 (Minn. Ct. App. 1994) (privilege for employer's statement of position in unemployment compensation proceeding, which is informal equivalent to a pleading or answer in a quasi-judicial proceeding). It also applies to statements made by top-level cabinet-type and executive government officials in state government. *See Carter v. Peace Officers Standards and Training Bd.*, 558 N.W.2d 267, 274 (Minn. Ct. App. 1997); *Carradine v. State*, 511 N.W.2d 733, 735 (Minn. 1994); *Johnson v. Dirkswager*, 315 N.W.2d 215 (Minn. 1982) (Commissioner of Minnesota Department of Public Welfare); *Board of Regents v. Reid*, 522 N.W.2d 344 (Minn. Ct. App. 1994), rev. denied, (Minn. Oct. 27, 1994) (University of Minnesota officials). *But see LeBaron v. Minnesota Board of Public Defense*, 499 N.W.2d 39 (Minn. Ct. App. 1993), rev. denied (Minn. June 9, 1993) (district public defender not entitled to absolute privilege). An attorney has an absolute privilege to make defamatory statements if the statements are "a part of the preparation for or the conduct of a judicial proceeding . . . . An attorney is not absolutely privileged to make defamatory statements to the news media when the news media is unconnected with a proposed judicial proceeding." *Scott Fetzer Co. v. Williamson*, 101 F.3d 549 (8th Cir. 1996) (applying Minnesota law) (citations omitted).

An arresting officer has absolute immunity from civil suit for defamatory statements made in an arrest report. *See Carradine v. State*, 511 N.W.2d 733, 735 (Minn. 1994). An officer does not, however, have absolute immunity in responding to a reference check about a prospective employee. *See Minke v. City of Minneapolis*, 845 N.W.2d 179, 184 (Minn. 2014). Statements by the officer to the press may also be privileged if they are an exact or substantial repetition, with no amplification or comment, of the statements in the arrest report, which is a matter of public record. *Carradine v. State*, 511 N.W.2d at 737.

There is also an absolute privilege for responses that are required by statute. *See Dorn v. Peterson*, 512 N.W.2d 902, 906 (Minn. Ct. App. 1994); *LeBaron v. Minnesota Board of Public Defense*, 499 N.W.2d 39, 42 (Minn. Ct. App. 1993), rev. denied (Minn. June 9, 1993).

Defamatory statements are also privileged if the plaintiff consents to their publication. *See LeBaron v. Minnesota Board of Public Defense*, 499 N.W.2d 39, 42 (Minn. Ct. App. 1993), rev. denied (Minn. June 9, 1993).

Research References

West's Key Number Digest
Libel and Slander ⚷34 to 49

CIVJIG 50.35

QUALIFIED PRIVILEGE—ABUSE—ACTUAL MALICE (COMMON LAW STANDARD)

Definition of common law "malice"

A statement or communication is made with actual malice if the purpose is to injure a person and:

1. It is made with ill will and improper purposes, or
2. It is made without cause and without regard for the consequences.

USE NOTE

The existence of the privilege is a question of law for the court. Whether the privilege has been abused may be a fact question for the jury. This instruction should be used where the issue of abuse of a common law qualified privilege is involved. In cases where both New York Times "actual malice" and common law malice are both involved, *see* CIVSVF 50.94 and 50.96, dual use of the term "malice" may result in substantial confusion for a jury. In those cases, this instruction should not be given. The special verdict form in those cases encompasses the two questions essential to a determination of common law malice without using the term "malice."

AUTHORITIES

The existence of a qualified privilege is a question of law for the court, but once the privilege attaches, the plaintiff has the burden of proving that the privilege was abused. *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 920 (Minn. 2009); *Lewis v. Equitable Life Assurance Soc.*, 389 N.W.2d 876, 890 (Minn. 1986); *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 257 (Minn. 1980); *Rudebeck v. Paulson*, 612 N.W.2d 450 (Minn. Ct. App. 2000) rev. denied (Minn. Sept. 13, 2000). The abuse issue is generally for the jury. *See Phipps v. Clark Oil & Ref. Corp.*, 408 N.W.2d 569, 574 (Minn. 1987). The malice requirement can be met if the evidence provides a basis for "an inference that the defendant knew the statement was false by extrinsic evidence of ill feeling, or intrinsic evidence such as exaggerated language or the extent of publication." *Wallin v. Minnesota Dep't of Corrections*, 598 N.W.2d 393, 402 (Minn. Ct. App. 1999), rev. denied (Minn. Oct. 21, 1999).

As the court noted in *Lewis*, 389 N.W.2d at 890–891, there are two definitions of malice in defamation cases. One is drawn from the Supreme Court's decision in *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80, 84 S.Ct. 710, 726, 11 L.Ed.2d 686, 706–07 (1964). Under *New York Times Co.*, the Supreme Court held that a statement is published with actual malice if the defendant made the statement with knowledge of the falsity or in reckless disregard of the truth. *Id.* at 279–80. Reckless disregard means publication with serious doubts about the truth of the matter published. *See St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262 (1968).

The common law definition of actual malice requires a showing that the defendant "made the statement from ill will and improper motives, or causelessly and wantonly for the purpose of injuring the plaintiff." *McKenzie v. William J. Burns Intern. Detective Agency*, 149 Minn. 311, 312, 183 N.W. 516, 517 (1921). *McKenzie* was cited with approval by the Minnesota Supreme Court in *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 920 (Minn. 2009), *Lewis v. Equitable Life Assurance Soc.*, 389 N.W.2d 876, 891 (Minn. 1986), and *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 257 (Minn. 1980). *See also Keenan v. Computer Associates, Internat'l, Inc.*, 13 F.3d 1266, 1270 (8th Cir. 1994).

In *Lewis*, a case involving a defamatory statement made by an employer about employees, the court held that "[t]he common law definition is more appropriate in the employer-employee situation because it focuses on the employer's attitude toward the plaintiff." 389 N.W.2d at 891. In *Jadwin v. Minneapolis Star and Tribune Co.*, 367 N.W.2d 476 (Minn. 1985), appeal after remand, 390 N.W.2d 437 (Minn. Ct. App. 1986), the supreme court seemed to note a significant difference between common law malice and *New York Times Co.* malice:

> Common law malice differs significantly from constitutional malice necessary to overcome the constitutional privilege established in *New York Times Co. v. Sullivan* * * * . Although both types of malice focus on the defendant's state of mind, common law malice is established by proof of ill will or improper motive toward plaintiff * * * . Constitutional malice, by contrast, requires proof of defendant's knowledge of falsity or reckless disregard of the truth or falsity of what he published.

Jadwin v. Minneapolis Star and Tribune Co., 367 N.W.2d at 481, n. 5.

In *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 258 (Minn. 1980), the court noted that "the New York Times 'actual malice' standard was fashioned as an exception to the common law rule to permit the printed and electronic media to perform their function of informing the public about newsworthy people and events without undue fear of defamation liability," and that its focus was therefore "on the defendant's attitude toward the truth of what he has said rather than on his attitude toward the plaintiff is proper only when a media defendant is involved."

In *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 922 (Minn. 2009), the supreme court cited *Stuempges* for the proposition that "[t]he *New York Times* actual malice standard is a higher standard than that reqired by the common law," insofar as the "plaintiff does not need to show that the defendant made the defamatory statement with knowledge that it was false to satisfy the common law standard." But the court also stated that "if a plaintiff's evidence meets the higher standard, the same evidence is also probative on the question of whether the less rigorous common law standard is met." Whether the *New York Times* actual malice standard is a "higher standard" under *Stuempges* or simply a standard with a different focus, the key point in *Bahr* is that evidence that relates to whether the defendant knew of the falsity of the defamatory communication or whether the defendant had substantial doubts about its truth is relevant on the issue of common law malice.

Research References

West's Key Number Digest
Libel and Slander ⚷41 to 49, 50.5, 51, 124(6)

CIVJIG 50.40

ACTUAL MALICE—CONSTITUTIONAL STANDARD

It must be proved by clear and convincing evidence that the allegedly defamatory statement or communication was published with actual malice.

Definition of "actual malice"

A statement or communication is published with "actual malice" if the person who published it knew it was false or had serious doubts about its truth.

Definition of "clear and convincing evidence"

"Clear and convincing evidence" means it is highly probable that the statement was published with actual malice.

Put another way, you must firmly believe that (defendant) published the statement or communication with actual malice.

USE NOTE

The Committee recommends that the trial court instruct the jury at the beginning of the trial on the meaning of "actual malice," as well as at any point during the trial where the definition will be placed in issue, in order to comply with *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989). The "actual malice" issue should also be the subject of a specific instruction and special verdict question on the special verdict form.

AUTHORITIES

In *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), the Supreme Court of the United States held that public officials who are libeled must prove with convincing clarity that the libelous statements were published with actual malice. Actual malice is shown by publication with knowledge of the falsity of the statement or in reckless disregard of the truth or falsity of the publication. *New York Times Co. v. Sullivan*, 376 U.S. at 279–80. Reckless disregard means publication with serious doubts about the truth of the matter. *See St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262, 267 (1968). The holding in *New York Times*

Co. was extended to public figures in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967), rehearing denied, 389 U.S. 889, 88 S.Ct. 11, 19 L.Ed.2d 197 (1967). "Minnesota affords to nonmedia defendants the same first amendment protection for criticism of public officials that it grants to the mass media." *Britton v. Koep*, 470 N.W.2d 518, 521 (Minn. 1991).

In *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971), the Supreme Court, in a plurality opinion, held that the *New York Times Co.* actual malice standard applied to public issues, as well as public officials and figures. However, in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), the Court rejected the *New York Times Co.* actual malice standard in libel cases brought by private plaintiffs against nonmedia defendants. Determining whether a person is a private person is a process of elimination. Private persons are those who are neither public officials nor public figures. "The public or private status of the plaintiff in a defamation action is a question of law." *Britton v. Koep*, 470 N.W.2d 518, 520 (Minn. 1991); *Jadwin v. Minneapolis, Star & Tribune Co.*, 367 N.W.2d 476, 483 (Minn. 1985).

In *Britton v. Koep*, 470 N.W.2d 518, 522 (Minn. 1991), the court utilized three criteria in determining whether a county probation officer is a public official for the purposes of the *New York Times* rule:

> performing governmental duties directly related to the public interest . . . ; holding a position to influence significantly the resolution of public issues . . . ; and government employees having, or appearing to the public to have, substantial responsibility for or control over the conduct of government affairs . . . .

In *Elstrom v. Independent School Dist. No. 270*, 533 N.W.2d 51, 56 (Minn. Ct. App. 1995), rev. denied (Minn. July 27, 1995), the court of appeals applied a similar standard taken from *Rosenblatt v. Baer*, 383 U.S. 75, 86 S.Ct. 669, 15 L.Ed.2d 597 (1966), in holding that a public school teacher is a public official:

> Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees . . . the *New York Times* malice standards apply.

The Court in *Gertz* established three standards for determining whether a person is a public figure:

> Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare. For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions

> of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

Gertz v. Robert Welch, Inc., 418 U.S. at 345. The public figure standards were further elaborated in subsequent cases. See *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 99 S.Ct. 2701, 61 L.Ed.2d 450 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d 411 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154 (1976).

The Minnesota Supreme Court has applied the same standards. *See Chafoulias v. Peterson*, 668 N.W.2d 642 (Minn. 2003); *Jacobson v. Rochester Communications Corp., Inc.*, 410 N.W.2d 830, 833–36 (Minn. 1987); *Jadwin v. Minneapolis Star and Tribune Co.*, 367 N.W.2d 476, 485–86 (Minn. 1985). *See also LeDoux v. Northwest Publishing, Inc.*, 521 N.W.2d 59, 65 (Minn. Ct. App. 1994), rev. denied (Minn. Nov. 16, 1994). The supreme court in *Chafoulias* noted that the criteria to be used in determining whether a person is a limited purpose public figure are suggested by *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974):

> (1) whether a public controversy existed; (2) whether the plaintiff played a meaningful role in the controversy; and (3) whether the allegedly defamatory statement related to the controversy.

668 N.W.2d at 651.

The court in *Chafoulias* defined a "public controversy" as follows:

> A public controversy is a dispute that "has received public attention because its ramifications will be felt by persons who are not direct participants." . . . Private concerns are not public controversies simply because they attract attention . . . In isolating the public controversy, courts look to those controversies that are already the subject of debate in the public arena at the time of the alleged defamation . . . .
>
> But the scope of the public controversy, for this purpose, may be narrower than the breadth of the public's interest. Many stories may be considered "newsworthy" and deserving of the public's attention, but may not be a "public controversy." A public controversy requires two elements: (1) there must be some real dispute that is being publicly debated; and (2) it must be reasonably foreseeable that the dispute could have substantial ramifications for persons beyond the immediate participants . . . .
>
> Under this definition, the existence of a private civil dispute is not

> necessarily a public controversy. Although such a dispute may receive publicity by inevitably becoming public when filed in court, or when a party chooses to make his or her allegations public, the courts have recognized that the mere participation in the litigation of such disputes does not create a public controversy that confers public figure status . . . .

668 N.W.2d at 652 (citations omitted).

If there is a public controversy, the next step is to determine the role of the person in that controversy. The Minnesota Supreme Court in *Chafoulias* relied in part on *Gertz* in concluding that the issue is whether the person " 'voluntarily inject[ed] himself' or was 'drawn into' that controversy." 668 N.W.2d at 652, citing Gertz, 418 U.S. at 351. That means considering whether the person has "thrust himself to the forefront of the controversy as we have defined it so as to achieve a 'special prominence' in the debate and become a factor in resolving the controversy." 668 N.W.2d at 653.

The person "must either 'have been purposely trying to influence the outcome' of the controversy or must have realistically 'expected, because of his position in the controversy, to have an impact on its resolution.' " 668 N.W.2d at 653, citing *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1297 (D.C. Cir. 1980), cert. denied, 449 U.S. 898, 101 S.Ct. 266, 66 L.Ed.2d 128 (1980). The supreme court said that the analysis requires examination of the extent to which the person's participation in the controversy was voluntary, the extent to which the person had access to effective channels of communication to counteract false statements, and the prominence of the role the person played in the public controversy. 668 N.W.2d at 653.

The final factor, the relationship of the statement to the public controversy, requires an examination of whether the statement "relates directly" to the controversy or is "necessarily germane" to the controversy. 668 N.W.2d at 654.

The court in *Jadwin* applied the *Gertz* standard to private plaintiffs, but took a different position with respect to corporate plaintiffs:

> We hold * * * that corporate plaintiffs in defamation actions must prove actual malice by media defendants when the defendants establish that the defamatory material concerns matters of legitimate public interest in the geographic area in which the defamatory material is published, either because of the nature of the business conducted or because the public has an especially strong interest in the investigation or disclosure of the commercial information at issue. Such a rule will encourage the media to probe the business world to the depth which is necessary to permit the kind of business reporting vital to an informed public.

367 N.W.2d at 487–88. Corporate plaintiffs must therefore prove actual malice when the defendants establish that the matter published is of legitimate public concern.

In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985), the Supreme Court held that false statements in a credit report justified recovery by the plaintiff of presumed and punitive damages, even absent a showing of actual malice, where the statements did not involve matters of public concern. 472 U.S. at 762–63. Conversely, if defamatory statements do involve a matter of public concern, the plaintiff will not be entitled to presumed or punitive damages unless actual malice is proved. The Minnesota Supreme Court applied *Dun & Bradstreet* in *Jacobson v. Rochester Communications Corp., Inc.*, 410 N.W.2d 830 (Minn. 1987).

In *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989), the United States Supreme Court expressed concern over a jury's ability to understand the *New York Times Co.* actual malice standard, which cannot be satisfied through proof of "ill will or 'malice' in the ordinary sense of the term." 491 U.S. at 666, 109 S.Ct. at 2685. To minimize the possibility of misunderstanding the standard, the Court took the position that the jury should be instructed " 'in plain English' at appropriate times during the course of the trial concerning the not-so-plain meaning of this phrase."

In *Diesen v. Hessburg*, 455 N.W.2d 446 (Minn. 1990), cert. denied, 498 U.S. 1119, 111 S.Ct. 1071, 112 L.Ed.2d 1177 (1991), the Minnesota Supreme Court noted that the defendant's motive in publishing a statement does not establish actual malice, absent evidence that the defendant "had actual knowledge of falsity." Actual malice means that "the defendant acted with a reckless disregard for the truth or had a high degree of knowledge of the statement's probable falsity." 455 N.W.2d at 452–53 (*citing Herbert v. Lando*, 441 U.S. 153, 156–57, 99 S.Ct. 1635, 1638–39, 60 L.Ed.2d 115 (1979)). Ill-will "is irrelevant to the malice inquiry" (citing *Harte-Hanks*).

Research References

West's Key Number Digest

Libel and Slander 🔑51, 124(3), 124(6)

CIVJIG 50.45

DEFAMATION—NEGLIGENCE

Defamation—negligence standard

> (Defendant) was negligent in the publication of a statement or communication if (he) (she) in the exercise of reasonable care should have known that the statement was false.

USE NOTE

This instruction should be given in cases involving defamation claims brought by private persons whose suit challenges speech on matters of public concern.

AUTHORITIES

In *Jadwin v. Minneapolis Star and Tribune Co.*, 367 N.W.2d 476 (Minn. 1985), the Minnesota Supreme Court adopted a negligence standard in cases to which *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), applies:

> After carefully considering the standards of liability, and the rules of the various states adopting the negligence standard in particular, we conclude that the following standard best reconciles the competing societal interests in the protection of private reputation and the media's right and obligation to freely investigate and report the news. We hold that a private individual may recover actual damages for a defamatory publication upon proof that the defendant knew or in the exercise of reasonable care should have known that the defamatory statement was false. The conduct of defamation defendants will be judged on whether the conduct was that of a reasonable person under similar circumstances.

367 N.W.2d at 491. *See also Moreno v. Crookston Times Printing Co.*, 610 N.W.2d 321, 329 (Minn. 2000). The court in *Jadwin* did not limit the negligence requirement to cases involving speech on matters of public concern. Accordingly, the case could be interpreted to require all defamation plaintiffs to establish negligent publication. *Jadwin*, however, was decided before the United States Supreme Court's decision in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759–60, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985), in which the application of the *Gertz* standard was made dependent on whether the defamation claim was based on speech involving a matter of public concern.

In adopting the standard, the court stated that it accepted the position of the Restatement (Second) of Torts § 580B cmt. g (1977), which means that "the conduct of defamation defendants will be judged on whether the conduct was that of a reasonable person under similar circumstances," and that " '[c]ustoms and practices within the profession are relevant in applying the negligence standard, which is, to a substantial degree, set by the profession itself, though custom is not controlling.' " 367 N.W.2d at 491–92.

The negligence standard is qualified by *Cole v. Star Tribune*, 581 N.W.2d 364 (Minn. Ct. App. 1998), in which the court of appeals adopted the wire service defense:

> [A] newspaper, under ordinary circumstances, cannot be found by a jury to have acted negligently by relying on the accuracy of a news item obtained from a reputable wire service.

Cole v. Star Tribune, 581 N.W.2d at 368.

While no Minnesota Supreme Court case has adopted the defense, the court of appeals in *Cole* noted that the supreme court, in *Church of Scientology of Minn. v. Minnesota State Med. Ass'n Foundation*, 264 N.W.2d 152 (Minn. 1978), took a similar position in a case where a medical association provided a state agency a magazine article that was critical of the plaintiff. The supreme court held that the medical association had no reason to believe that the article was false and defamatory, because the original publisher was known to be reputable. 264 N.W.2d at 154–55.

The following instruction may be used in cases where the wire service defense is appropriate:

Republishing information

> (Defendant) republished a defamatory statement received from a reputable source.
>
> You must decide:
>
> 1. Whether it was reasonable for (the defendant) to rely on the accuracy of the information, or
>
> 2. Whether (defendant) knew or had reason to know that the statement was false and defamatory.

Research References

West's Key Number Digest
Libel and Slander ⚷1, 4, 124(1)

CIVJIG 50.50

PRESUMED DAMAGES

Deciding harm for defamation

The only question for you to decide [in answering Question __] is the amount of money (plaintiff) is entitled to receive for:

1. Harm to (his) (her) reputation and standing in the community
2. Mental distress
3. Humiliation
4. Embarrassment

No evidence of actual harm is required.

USE NOTE

This instruction should be used in cases where damages are presumed. It is applicable in several cases. First, it applies where the plaintiff is a private person,whose suit is not based upon a matter of public concern, and who brings either a libel claim or a claim that fits into one of the categories of slander *per se*. Second, it applies to a slander claim that does not fit into one of those categories if the plaintiff is able to prove special damages as defined in CIVJIG 50.60. Finally, it applies to public officials or figures or private persons whose defamation claims are based on speech that is a matter of public concern who meet the constitutional standard in *New York Times Co. v. Sullivan*. This instruction does not apply to defamation claims by private persons whose defamation claims are based upon matters of public concern. Proof of actual damage is required in those cases.

AUTHORITIES

At common law, damages are presumed from any libel. *See Advanced Training Systems, Inc. v. Caswell Equip. Co., Inc.*, 352 N.W.2d 1, 9 (Minn. 1984); *see also Becker v. Alloy Hardfacing & Engineering Co.*, 401 N.W.2d 655, 661 (Minn. 1987) (stating that damages are presumed where there is libel *per se*, defined as libel that falls in the categories of slander *per se*). General damages are also presumed if the defamatory statement is slander *per se*, *see Stuempges v. Parke, Davis & Co.*, 297

N.W.2d 252, 259 (Minn. 1980); *Imperial Developers, Inc. v. Seaboard Surety Co.*, 518 N.W.2d 623, 627 (Minn. Ct. App. 1994); or if not, if the plaintiff proves special damages. *See* Restatement (Second) of Torts § 575 cmt. a (1977); *see also Gaare v. Melbostad*, 186 Minn. 96, 97, 242 N.W. 466, 467 (1932); *Larson v. R.B. Wrigley Co.*, 183 Minn. 28, 29–30, 235 N.W. 393, 394 (1931). In *Becker*, the supreme court specifically reaffirmed the presumed damages rule in cases involving defamation *per se*. 401 N.W.2d at 661. The court in that case affirmed a substantial compensatory damages award based upon the plaintiff's upset, embarrassment, feelings that his personal reputation had been injured, and, given those concerns, the additional pressure the plaintiff put on himself to work longer and harder hours. 401 N.W.2d at 661.

In *Longbehn v. Schoenrock*, 727 N.W.2d 153 (Minn. Ct. App. 2007), the court of appeals reversed an award to the plaintiff of presumed general damages in a slander *per se* action. While the court noted that damages are presumed in cases involving defamation *per se*, it noted the concern about presumed damages in defamation cases expressed by the Supreme Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974):

> The common law of defamation is an oddity of tort law, for it allows recovery of . . . damages without evidence of actual loss . . . . Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred. The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms . . . . [T]he States have no substantial interest in securing for plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury.

Gertz, 418 U.S. at 349, 94 S.Ct. at 3011–12.

The court of appeals then said:

> Although the Minnesota Supreme Court has held that *Gertz's* constitutional protections do not apply to a private plaintiff suing a private defendant on an issue not of public concern, [*Richie v. Paramount Pictures Corp.*, 544 N.W.2d 21, 28 (Minn. 1996)], we find *Gertz*'s proposition that states have no interest in securing gratuitous awards far exceeding actual injury to be persuasive. Based on the record in this case, including the context in which respondent made the defamatory statement, we conclude that $230,000 in general damages far exceeds the amount of past and future harm to appellant's reputation, mental distress, humiliation, and embarrassment that would normally flow from a publication of this kind. Accordingly, we remand for a new trial on general damages.

Langbehn, 727 N.W.2d at 163.

It is not clear from the court's holding whether it intends that plaintiffs in all defamation cases will now be required to prove actual damages in order to be entitled to recover, or that the damages were simply excessive under the circumstances.

The court of appeals remanded the case for a retrial on the damages issue. In answer to the special verdict questions submitted by the district court, the jury found that the plaintiff did not suffer harm to his reputation, emotional distress, humiliation, or embarrassment as a result of the defendant's use of a defamatory nickname in reference to the plaintiff on a single occasion. On the third appeal the plaintiff argued that the special verdict questions and jury instructions were in error in requiring a finding of actual damages. The court of appeals agreed and reversed, *Longbehn v. Schoenrock*, 2010 WL 3000283 (Minn. Ct. App. Aug. 3, 2010).

The erroneous instruction read in part:

> A person is liable for the general harm *which results from* the defamatory statement . . . . Your duty as a jury is to determine the amount of damages, if any, *that the plaintiff sustained by* the defendant's use of that nickname . . . . *A party asking for damages must prove the nature, extent, duration and consequences of his harm.*

Longbehn v. Schoenrock, 2010 WL 3000283, at *3 (Minn. Ct. App. Aug. 3, 2010) (emphasis the court's). In holding that the instructions were in error the court of appeals reaffirmed the basic rule that damages are presumed in cases involving defamation *per se*, and noted that its prior opinion in *Longbehn v. Schoenrock*, 727 N.W.2d 153 (Minn. Ct. App.2007) (Longbehn II), is consistent with the controlling supreme court precedent:

> Our prior opinion in *Longbehn II* is consistent with *Becker v. Alloy Hardfacing & Eng'g Co.*, 401 N.W.2d 655 (Minn.1987), in which the supreme court reaffirmed the rule "that where a defendant commits libel per se, general . . . damages are recoverable without proof of actual damages." Id. at 661. In *Becker*, the supreme court declined to "overrule long-established precedent" and instead "reaffirm[ed] the rule that where a defendant's statements are defamatory per se, general damages are presumed." Id.

Longbehn v. Schoenrock, 2010 WL 3000283, at *3 (Minn. Ct. App. Aug. 3, 2010).

Damages are also presumed if the plaintiff is required to and does meet the *New York Times Co.* actual malice standard, which applies to claims by public officials and figures and by private figures if the defamatory statement involves a matter of public concern, *see Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 756, 105

S.Ct. 2939, 2944, 86 L.Ed.2d 593 (1985); *Jacobson v. Rochester Communications Corp.*, 410 N.W.2d 830, 836, n. 7 (Minn. 1987); or where the defamation claim is brought by a corporate plaintiff, *see Jadwin v. Minneapolis Star and Tribune Co.*, 367 N.W.2d 476, 487 (Minn. 1985), appeal after remand, 390 N.W.2d 437 (Minn. Ct. App. 1986).

In *Richie v. Paramount Pictures Corp.*, 544 N.W.2d 21, 27 (Minn. 1996), the Minnesota Supreme Court noted that while the United States Supreme Court in *Gertz* required proof of actual harm, the Court held that the harm need not be to reputation in order to justify recovery. In imposing a more rigid proof requirement than in *Gertz*, the Minnesota Supreme Court held that Minnesota law requires a showing of actual harm to reputation before a defamation action can be sustained:

> This court has consistently acknowledged that the purpose of a defamation action is to "compensat[e] private individuals for wrongful injury to reputation." . . .
>
> Further, this court has exercised "historical caution regarding emotional distress claims." . . .
>
> Finally, while defamation focuses on injury to reputation, it is invasion of privacy torts that compensate for "mental distress from having been exposed to public view." . . . Thus, to allow emotional harm to form the basis for liability in a defamation action would be the practical equivalent of allowing a plaintiff to bring an invasion of privacy claim. However, this court "has never recognized, either by legislative or court action, a cause of action for invasion of privacy, even though many other states have done so." . . . To allow emotional harm as the basis of a defamation action would be inconsistent with this court's rejection of invasion of privacy claims. Thus we hold that in a defamation suit, emotional damages are not compensable absent harm to reputation.

Richie v. Paramount Pictures Corp., 544 N.W.2d at 28.

However, the court made it clear in its opinion that presumed damages in cases involving a private plaintiff suing a private defendant on a private matter would be untouched.

Research References

West's Key Number Digest
Libel and Slander ⚷33, 115, 124(8)

CIVJIG 50.55

DEFAMATION—ACTUAL DAMAGES

Factors to consider in deciding damages for defamation

Damages for the publication of a defamatory statement or communication include:

1. Harm to (plaintiff)'s reputation and standing in the community
2. Mental distress
3. Humiliation
4. Embarrassment
5. Physical disability
6. Economic loss caused by the defamatory statement or communication.

USE NOTE

This instruction should be used in cases to which *Gertz* applies. In those cases, which involve private plaintiffs whose defamation claims arise from speech on matters of legitimate public concern, the plaintiff must prove fault and actual damages. Within the meaning of *Gertz*, actual damages are not the equivalent of special damages (pecuniary loss).

See CIVJIG 90.15, for the instruction on burden of proof of damages.

AUTHORITIES

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), the United States Supreme Court held that a private plaintiff can recover only actual damages supported by competent evidence from a media defendant who acted negligently in publishing a defamatory statement concerning a matter of public concern. 418 U.S. at 349–50, 94 S.Ct. at 3011–12; *Jadwin v. Minneapolis Star and Tribune*, 367 N.W.2d 476, 492 (Minn. 1985), appeal after remand, 390 N.W.2d 437 (Minn. Ct. App. 1986). The Supreme Court also held that presumed and punitive damages could not be recovered under those circumstances absent proof of "actual malice." 418 U.S. at 348–50, 94 S.Ct. at 3011–12; *Jadwin*, 367 N.W.2d at 492.

According to the Supreme Court in *Gertz*, "actual injury" is the actual harm inflicted by a defamatory statement. It includes the more customary types of damages, such as "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." 418 U.S. at 350. It also includes special damage, although a dollar value does not have to be assigned. However, there must be evidence to support the damages award. 418 U.S. at 350; *see* Note, Minnesota Defamation Law and the Constitution: First Amendment Limitations on the Common Law Torts of Libel and Slander, 3 Wm. Mitchell L.Rev. 81, 110 (1977).

In *Richie v. Paramount Pictures Corp.*, 544 N.W.2d 21, 27 (Minn. 1996), the Minnesota Supreme Court noted that while *Gertz* requires actual harm, the harm need not be to reputation in order to justify recovery. The court held that Minnesota law requires a showing of actual harm to reputation before a defamation action can be sustained:

> This court has consistently acknowledged that the purpose of a defamation action is to "compensat[e] private individuals for wrongful injury to reputation." . . .
>
> Further, this court has exercised "historical caution regarding emotional distress claims." . . .
>
> Finally, while defamation focuses on injury to reputation, it is invasion of privacy torts that compensate for "mental distress from having been exposed to public view." . . . Thus, to allow emotional harm to form the basis for liability in a defamation action would be the practical equivalent of allowing a plaintiff to bring an invasion of privacy claim. However, this court "has never recognized, either by legislative or court action, a cause of action for invasion of privacy, even though many other states have done so." . . . To allow emotional harm as the basis of a defamation action would be inconsistent with this court's rejection of invasion of privacy claims. Thus we hold that in a defamation suit, emotional damages are not compensable absent harm to reputation.

Richie v. Paramount Pictures Corp., 544 N.W.2d at 28.

Research References

West's Key Number Digest
Libel and Slander ⚷113, 115, 124(8)

CIVJIG 50.60

DEFAMATION—SPECIAL DAMAGE

Definition of "special damages"

"Special damages" means economic loss directly caused by a defamatory statement or communication.

Special damages include:

[1. Loss of employment]

[2. Loss of a presently existing advantage]

[3. Failure to realize a reasonable expectation of financial gain].

USE NOTE

This instruction serves two purposes. It applies in slander cases where the plaintiff is unable to prove slander *per se* and in defamation cases where the plaintiff is not required to prove special damage in order to recover, but is nonetheless seeking to recover for special damages.

AUTHORITIES

A defamed plaintiff can recover special damages if he proves actual and special pecuniary loss. *See Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 258 (Minn. 1980). As outlined by Prosser and Keeton:

> [W]hile the loss of customers or business, or a particular contract or employment, or of an advantageous marriage, will be sufficient to make the slander actionable, it is not enough that the plaintiff has lost the society of his friends and associates, unless their hospitality or assistance was such that it could be considered a pecuniary benefit; or that he has suffered acute mental distress or serious physical illness as a result of the defamation, or has been put to expense to refute it.

W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on the Law of Torts § 112 at 794 (5th ed. 1984).

The Restatement (Second) of Torts § 575 cmt. b (1977), describes the special harm requirement as follows:

> Special harm must result from the conduct of a person other than

> the defamer or the one defamed and must be legally caused by the defamation. It is, however, immaterial whether the harmful action is taken because the person who takes it believes the defamation, or because he is unwilling to deal or to associate with one whose reputation has been impaired by it. Loss of reputation alone is not enough to make the defamer liable * * * unless it is reflected in some kind of economic or pecuniary loss. So too, lowered social standing and its purely social consequences are not sufficient. * * * If, however, the loss of reputation results in material loss capable of being measured in money, the fact that the lowered social standing resulting from the slander itself causes the acts that produce the loss does not prevent the tangible loss from being special harm. Thus, while a slander that has been so widely disseminated as to cause persons previously friendly to the plaintiff to refuse social intercourse with him is not of itself special harm, the loss of the material advantages of their hospitality is sufficient. Special harm may be a loss of presently existing advantage, as a discharge from employment. It may also be a failure to realize a reasonable expectation of gain, as the denial of employment which, but for the currency of the slander, the plaintiff would have received. It is not necessary that he be legally entitled to receive the benefits that are denied to him because of the slander. It is enough that the slander has disappointed his reasonable expectation of receiving a gratuity.

The special damages recoverable in a defamation action may include " 'a loss of [a] presently existing advantage, as a discharge from employment,' or 'a failure to realize a reasonable expectation of gain, as a denial of employment.' " *Longbehn v. Schoenrock*, 727 N.W.2d 153, 160 (Minn. Ct. App. 2007), citing *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 258–59 (Minn. 1980). The defamatory statement must be the legal cause of those damages. *Longbehn*, 727 N.W.2d 160.

Research References

West's Key Number Digest
Libel and Slander ⚷118, 124(8)

CIVJIG 50.65

PUNITIVE DAMAGES—DEFAMATION

[See CIVJIG 94.10.]

USE NOTE

In defamation cases, the standard jury instruction on punitive damages, CIVJIG 94.10, should be given if punitive damages are appropriate in the case. A finding of "actual malice" pursuant to *New York Times Co. v. Sullivan* may be relevant to but not the same as a finding of "deliberate disregard" under Minnesota's punitive damages statute, M.S.A. § 549.20. The defamation plaintiff would have to meet both standards in order to recover punitive damages, unless actual and its progeny were not required because the speech was not on a matter of public concern.

AUTHORITIES

In defamation cases brought by public officials and public figures or by private persons whose defamation claims arise out of speech on matters of public concern, punitive damages may not be recovered absent proof of actual malice. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348–50, 94 S.Ct. 2997, 3011–3012, 41 L.Ed.2d 789, 810–811 (1974).

The Minnesota Supreme Court's defamation decisions have followed *Gertz* and *Dun & Bradstreet. See Jacobson v. Rochester Communications Corp.*, 410 N.W.2d 830, 836, n. 7 (Minn. 1987); *Jadwin v. Minneapolis Star and Tribune Co.*, 367 N.W.2d 476, 492 (Minn. 1985), appeal after remand, 390 N.W.2d 437 (Minn. Ct. App. 1986).

Even if the defamation plaintiff establishes *New York Times* "actual malice," that finding is not the same as the "deliberate disregard" standard in M.S.A. § 549.20, even though the evidentiary standard for both is "clear and convincing evidence."

Research References

West's Key Number Digest
Libel and Slander ⚷120, 124(8)

SPECIAL VERDICT FORMS

CIVSVF 50.90

LIBEL—PRIVATE PLAINTIFF AND PRIVATE ISSUE—BASIC ELEMENTS, PRESUMED DAMAGES, SPECIAL DAMAGES AND QUALIFIED PRIVILEGE

1. Was (the statement or communication) by (defendant) defamatory?

   ____
   Yes or No

2. *If your answer to Question 1 was "Yes," then answer this question*: Did the defamatory statement refer to (plaintiff)?

   ____
   Yes or No

3. *If your answer to Question 2 was "Yes," then answer this question*: Was (the statement or communication) published?

   ____
   Yes or No

4. *If your answer to Question 3 was "Yes," then answer this question*: Was (the statement or communication) true?

   ____
   Yes or No

5. *If your answer to Question 4 was "No" then answer this question:* Was (the statement or communication) made by (defendant) with actual malice?

   ____
   Yes or No

USE NOTE

This special verdict form for defamation cases covers the elements of defamation. The form that is actually used should cover only the issues that are actually in contention. The third question, covering publication, has the intent and negligence questions in brackets. Publication in a defamation case must be intentional or negligent. Much of the time, publication will not be in issue. If it is, and the answer hinges on whether the defendant published the statement negligently or intentionally, the appropriate bracketed part of the instruction should be chosen.

A decision to allow the jury to consider the issue of whether a statement is defamatory may in any given case involve threshold determinations to be first made as a matter of law by the trial judge. The judge may have to determine whether a statement or communication is capable of a defamatory meaning, including the issues of whether the statement or communication implies defamation, and/or whether the statement or communication is simply an opinion that does not reasonably imply the existence of defamatory facts.

Question 5 should be used in cases where the defendant has a qualified privilege to make the defamatory statement. The issue of whether the defendant has a privilege is a question of law for the court. If the privilege is established, the plaintiff has the burden of proving actual malice to overcome the privilege.

The jury should be instructed to answer the damages questions in CIVSVF 50.97 if it answered "Yes" to Question 5 on this verdict form.

The special verdict questions and their supporting jury instructions are as follows:

1. CIVJIG 50.10: Defamatory Communication.
2. There is no jury instruction on the issue of whether the defamatory statement referred to the plaintiff. At the appropriate point in the instructions, the jurors should be informed that they will be asked to determine whether the statement or communication referred to the plaintiff. No jury instruction is necessary on the issue.
3. CIVJIG 50.15: Publication.
4. CIVJIG 50.25: Truth.
5. CIVJIG 50.35: Qualified Privilege—Abuse—Actual Malice (Common Law Standard).

AUTHORITIES

There are four elements in a defamation claim:

1. The statement must be defamatory;
2. The statement must be false;
3. The statement must refer to the plaintiff;
4. The statement must be published.

Ferrell v. Cross, 557 N.W.2d 560, 565 (Minn. 1997); *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 255 (Minn. 1980).

In *Utecht v. Shopko Department Store*, 324 N.W.2d 652, 653–654 (Minn. 1982), the supreme court noted that "[t]he question whether a claimed defamatory innuendo is reasonably conveyed by the language used is for the court to determine. * * * If the words are capable of the defamatory meaning, it is for the jury to decide whether they were in fact so understood."

The issue of whether the defendant has a privilege is a question of law for the court. *Lewis v. Equitable Life Assurance Soc'y*, 389 N.W.2d 876, 890 (Minn. 1986); *LeBaron v. Minnesota Board of Public Defense*, 499 N.W.2d 39, 41 (Minn. Ct. App. 1993), rev. denied (Minn. June 9, 1993); *Wilson v. Weight Watchers of Upper Midwest, Inc.*, 474 N.W.2d 380, 384 (Minn. Ct. App. 1991), rev. denied (Minn. Oct. 16, 1991). If the privilege is established, the plaintiff has the burden of proving actual malice to overcome the privilege. *Lewis v. Equitable Life Assurance Soc'y*, 389 N.W.2d 876, 890 (Minn. 1986); *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 257 (Minn. 1980). The abuse issue is generally for the jury. *See Phipps v. Clark Oil & Ref. Corp.*, 408 N.W.2d 569, 574 (Minn. 1987).

CIVSVF 50.91

SLANDER—PRIVATE PLAINTIFF AND PRIVATE ISSUE—BASIC ELEMENTS, PRESUMED DAMAGES, AND SPECIAL DAMAGES

1. Did (the statement or communication)

[Accuse (plaintiff) of a crime involving moral turpitude?]

[Accuse (plaintiff) of having a loathsome disease?]

[Accuse (plaintiff) of having committed serious sexual misconduct?]

[Affect (plaintiff) in (his) (her) business, trade, profession, office, or calling?]

____
Yes or No

2. *If your answer to Question 1 was "Yes," then answer this question*: Did the defamatory statement refer to (plaintiff)?

____
Yes or No

3. *If your answer to Question 2 was "Yes," then answer this question*: Was (the statement or communication) published?

____
Yes or No

4. *If your answer to Question 3 was "Yes," then answer this question*: Was (the statement or communication) true?

____
Yes or No

USE NOTE

Slander *per se* includes slander that:

1. Accuses the plaintiff of having committed a crime involving moral turpitude;
2. Accuses the plaintiff of having a loathsome disease;

3. Accuses the plaintiff of having committed serious sexual misconduct; or

4. Relates to the plaintiff in the plaintiff's business, trade, profession, office, or calling.

In a slander case, it is a question of law for the court as to whether a crime, disease, or type of sexual misconduct makes the slander actionable *per se*. It is a question for the jury as to whether the spoken language charges the plaintiff with conduct or characteristics or a condition incompatible with the proper conduct of the plaintiff's business, trade, profession, office, or calling. In such a case, the special verdict question should be framed to encompass that issue. No jury instruction is necessary.

If the plaintiff establishes slander *per se*, the plaintiff is entitled to recover presumed damages. If not, the plaintiff must prove special damages in order to recover.

The jury should be instructed to answer the damages questions in CIVSVF 50.97 if it answered "Yes" to Question 4 on this verdict form.

The special verdict questions and their supporting jury instructions are as follows:

1. CIVJIG 50.20: Slander *Per Se*.

2. There is no jury instruction on the issue of whether the defamatory statement referred to the plaintiff. At the appropriate point in the instructions, the jurors should be informed that they will be asked to determine whether the statement or communication referred to the plaintiff. No jury instruction is necessary on the issue.

3. CIVJIG 50.15: Publication.

4. CIVJIG 50.25: Truth.

AUTHORITIES

Slander is not actionable without proof of special damages unless the defamatory statement falls within one of the categories of slander *per se*. There are four categories of slander *per se* that have been recognized by the courts. They are defamatory statements that (1) affect a person in his business, trade, or profession; (2) impute a loathsome disease to the plaintiff; (3) impute unchastity to a woman; and (4) charge the commission of a crime, or a crime involving moral turpitude. *See Anderson v. Kammeier*, 262 N.W.2d 366, 372 (Minn. 1977); *see also Larson v. R.B. Wrigley Co.*, 183 Minn. 28, 29, 235 N.W. 393, 394 (1931) (stating that two classes of words are actionable *per se*: (1) words charging the commission of a crime involving moral turpitude, and (2) words that directly disparage and tend to prejudice and injure a person in his office, profession, trade, or business). In *Advanced Training Sys., Inc. v. Caswell Equip. Co., Inc.*, 352 N.W.2d 1, 9, n. 1 (Minn. 1984), the court noted the slander *per se* categories of "imputation of crime, loathsome disease, defamation affecting business, or unchastity in a woman." Damages are presumed in slander *per se* cases. *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 259 (Minn. 1980).

CIVSVF 50.92

SLANDER—SPECIAL DAMAGES

1. Was (the statement or communication) by (defendant) defamatory?

____
Yes or No

2. *If your answer to Question 1 was "Yes," then answer this question*: Did the defamatory statement refer to (plaintiff)?

____
Yes or No

3. *If your answer to Question 2 was "Yes," then answer this question*: Was (the statement or communication) published?

____
Yes or No

4. *If your answer to Question 3 was "Yes," then answer this question*: Was (the statement or communication) true?

____
Yes or No

5. *If your answer to Question 4 was "No," then answer this question*: Did (plaintiff) (incur economic loss, such as wage loss) (lose a reasonable expectation of economic gain, such as denial of employment) that was directly caused by the (statement) (communication)?

____
Yes or No

USE NOTE

In a slander action, the plaintiff must prove that the defamatory statement is slander *per se* (CIVSVF 50.91). If the plaintiff is unable to prove that the statement falls into one of the four categories of slander *per se*, the plaintiff must prove that the defamatory statement resulted in pecuniary loss. That issue is covered in Question 5 of this special verdict form. If the plaintiff is able to establish special damage within the intended meaning, then the plaintiff is entitled to recover presumed damages for injury to reputation, plus any special damage proved in the case.

The jury should be instructed to answer the damages questions in CIVSVF 50.97 if it answered "Yes" to Question 5 on this verdict form.

The special verdict questions and their supporting jury instructions are as follows:

1. CIVJIG 50.10: Defamatory Communication.
2. There is no jury instruction on the issue of whether the defamatory statement referred to the plaintiff. At the appropriate point in the instructions, the jurors should be informed that they will be asked to determine whether the statement or communication referred to the plaintiff. No jury instruction is necessary on the issue.
3. CIVJIG 50.15: Publication.
4. CIVJIG 50.25: Truth.
5. CIVJIG 50.60: Defamation—Special Damage.

AUTHORITIES

The Restatement (Second) of Torts § 575 cmt. b (1977), describes the special harm requirement as follows:

> Special harm must result from the conduct of a person other than the defamer or the one defamed and must be legally caused by the defamation. It is, however, immaterial whether the harmful action is taken because the person who takes it believes the defamation, or because he is unwilling to deal or to associate with one whose reputation has been impaired by it. Loss of reputation alone is not enough to make the defamer liable * * * unless it is reflected in some kind of economic or pecuniary loss. So too, lowered social standing and its purely social consequences are not sufficient. * * * If, however, the loss of reputation results in material loss capable of being measured in money, the fact that the lowered social standing resulting from the slander itself causes the acts that produce the loss does not prevent the tangible loss from being special harm. Thus, while a slander that has been so widely disseminated as to cause persons previously friendly to the plaintiff to refuse social intercourse with him is not of itself special harm, the loss of the material advantages of their hospitality is sufficient. Special harm may be a loss of presently existing advantage, as a discharge from employment. It may also be a failure to realize a reasonable expectation of gain, as the denial of employment which, but for the currency of the slander, the plaintiff would have received. It is not necessary that he be legally entitled to receive the benefits that are denied to him because of the slander. It is enough that the slander has disappointed his reasonable expectation of receiving a gratuity.

CIVSVF 50.93

LIBEL—PUBLIC OFFICIAL OR FIGURE

1. Was (the statement or communication) of and concerning (plaintiff)?

____
Yes or No

2. *If your answer to Question 1 was "Yes," then answer this question*: Was (the statement or communication) false?

____
Yes or No

3. *If your answer to Question 2 was "Yes," then answer this question*: Did (the statement or communication) convey a defamatory meaning as to (plaintiff)?

____
Yes or No

4. *If your answer to Question 3 was "Yes," then answer this question*: Was (the statement or communication) published?

____
Yes or No

5. *If your answer to Question 4 was "Yes," then answer this question:* By clear and convincing evidence, was (the statement or communication) made by (defendant) with actual malice?

____
Yes or No

USE NOTE

The Committee recommends that the trial court instruct the jury at the beginning of the trial on the meaning of "actual malice," as well as at any point during the trial where the definition will be placed in issue. The "actual malice" issue should also be the subject of a specific instruction and special verdict question on the special verdict form.

This special verdict form is for use in cases involving defamation claims brought by public officials or figures. The issue of whether a person is a public figure or official is always a question of law for the court. The ordering of the first four questions follows the format suggested by the Minnesota Court of Appeals in *Schlieman v. Gannett Minnesota Broadcasting, Inc.*, 637 N.W.2d 297, 306 n.1 (Minn. Ct. App. 2001).

A plaintiff who is a public official or figure must prove the basic elements of a defamation claim, and must also prove that the statement was made with actual malice. Actual malice must be proved by clear and convincing evidence. "Clear and convincing," as defined in CIVJIG 94.10 (Punitive Damages) means that the jury "must have a firm belief, or be convinced there is a high probability, that (defendant) acted this way."

When the plaintiff establishes *New York Times* actual malice, the plaintiff is entitled to recover presumed damages, and, where warranted, punitive damages.

The jury should be instructed to answer the damages questions in CIVSVF 50.97 if it answered "Yes" to Question 5 on this verdict form.

The special verdict questions and their supporting jury instructions are as follows:

1. CIVJIG 50.10: Defamatory Communication.
2. CIVJIG 50.25: Truth.
3. There is no jury instruction on the issue of whether the defamatory statement referred to the plaintiff. At the appropriate point in the instructions, the jurors should be informed that they will be asked to determine whether the statement or communication referred to the plaintiff. No jury instruction is necessary on the issue.
4. CIVJIG 50.15: Publication.
5. CIVJIG 50.40: Actual Malice—Constitutional Standard.

AUTHORITIES

"Actual malice," for constitutional purposes, means publishing the statement with knowledge of its falsity or in reckless disregard of the truth. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–280, 84 S.Ct. 710, 726, 11 L.Ed.2d 686, 706–707 (1964). "Reckless disregard" means publishing with substantial doubts about the truth of the matter. *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262 (1968).

In *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989), the United States Supreme Court expressed concern over a jury's ability to understand the *New York Times* actual malice standard, which cannot be satisfied through proof of "ill will or 'malice' in the ordinary sense of the term." 491 U.S. at 666, 109 S.Ct. at 2685. To minimize the possibility of misunderstanding the standard, the Court took the position that the jury should be instructed " 'in plain English' at appropriate times during the course of the trial concerning the not-so-plain meaning of this phrase."

CIVSVF 50.94

LIBEL—PUBLIC OFFICIAL OR FIGURE—QUALIFIED PRIVILEGE

1. Was (the statement or communication) of and concerning (plaintiff)?

____
Yes or No

2. *If your answer to Question 1 was "Yes," then answer this question*: Was (the statement or communication) false?

____
Yes or No

3. *If your answer to Question 2 was "Yes," then answer this question*: Did (the statement or communication) convey a defamatory meaning as to (plaintiff)?

____
Yes or No

4. *If your answer to Question 3 was "Yes," then answer this question*: Was (the statement or communication) published?

____
Yes or No

5. *If your answer to Question 4 was "Yes," then answer this question*: By clear and convincing evidence, was (the statement or communication) made by (defendant) with actual malice?

____
Yes or No

6. *If your answer to Question 5 was "Yes," then answer this question*: Was (the statement or communication) made by (defendant) for the purpose of injuring (plaintiff)?

____
Yes or No

7. *If your answer to Question 6 was "Yes," then answer this question:* Was (the statement or communication) made with ill will and improper purposes or without cause and without regard for the consequences?

____
Yes or No

USE NOTE

The Committee recommends that the trial court instruct the jury at the beginning of the trial on the meaning of "actual malice," as well as at any point during the trial where the definition will be placed in issue. The "actual malice" issue should also be the subject of a specific instruction and special verdict question on the special verdict form.

This special verdict form is intended for use in cases where the defamation claim is brought by a public official or figure and where a qualified privilege is raised in addition to the constitutional privilege in *New York Times Co. v. Sullivan*. The ordering of the first four questions follows the format suggested by the Minnesota Court of Appeals in *Schlieman v. Gannett Minnesota Broadcasting, Inc.*, 637 N.W.2d 297, 306 n.1 (Minn. Ct. App. 2001).

Where the qualified privilege attaches, and the issue is whether the plaintiff is able to overcome the privilege by a showing of common law "actual malice," there is great potential for jury confusion if the term "actual malice" is used to describe the showing the plaintiff must make to overcome the constitutional privilege and the same term is used to describe the showing the plaintiff must make to overcome the qualified privilege. Accordingly, this special verdict form, rather than using the term "actual malice" to determine whether the qualified privilege has been overcome, instead breaks the actual malice into its components to avoid the confusion that would otherwise exist were the jury to hear the term "actual malice" twice, but with different definitions.

The jury should be instructed to answer the damages questions in CIVSVF 50.97 if it answered "Yes" to Question 7 on this verdict form. Because damages would be presumed, the first two of those damages questions should ask what damages should be awarded "for the use of" the defamatory statement.

The special verdict questions and their supporting jury instructions are as follows:

1. There is no jury instruction on the issue of whether the defamatory statement referred to the plaintiff. At the appropriate point in the instructions, the jurors should be informed that they will be asked to determine whether the statement or communication referred to the plaintiff. No jury instruction is necessary on the issue.
2. CIVJIG 50.25: Truth.
3. CIVJIG 50.15: Publication.
4. CIVJIG 50.15: Publication.
5. CIVJIG 50.40: Actual Malice—Constitutional Standard.
6. CIVJIG 50.35: Qualified Privilege—Abuse—Actual Malice (Common Law Standard).

7. CIVJIG 50.35: Qualified Privilege—Abuse—Actual Malice (Common Law Standard).

AUTHORITIES

"Actual malice," for constitutional purposes, means publishing the statement with knowledge of its falsity or in reckless disregard of the truth. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–280, 84 S.Ct. 710, 726, 11 L.Ed.2d 686, 706–707 (1964). "Reckless disregard" means publishing with substantial doubts about the truth of the matter. *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262 (1968).

The existence of a qualified privilege is a question of law for the court, but once the privilege attaches, the plaintiff has the burden of proving that the privilege was abused. *Cavanaugh v. Burlington Northern Railroad Co.*, 941 F.Supp. 872, 879 (D.Minn. 1996); *Lewis v. Equitable Life Assurance Soc.*, 389 N.W.2d 876, 890 (Minn. 1986); *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 257 (Minn. 1980); *Rudebeck v. Paulson*, 612 N.W.2d 450 (Minn. Ct. App. 2000) rev. denied (Minn. Sept. 13, 2000). The abuse issue is generally for the jury. *See Phipps v. Clark Oil & Ref. Corp.*, 408 N.W.2d 569, 574 (Minn. 1987). The malice requirement can be met if the evidence provides a basis for "an inference that the defendant knew the statement was false by extrinsic evidence of ill feeling, or intrinsic evidence such as exaggerated language or the extent of publication." *Wallin v. Minnesota Dep't of Corrections*, 598 N.W.2d 393, 402 (Minn. Ct. App. 1999), rev. denied (Minn. Oct. 21, 1999).

CIVSVF 50.95

LIBEL—MATTER OF PUBLIC CONCERN

1. Was (the statement or communication) by (defendant) defamatory?

______________ Yes or No

2. Was (the statement or communication) false?

______________ Yes or No

3. *If your answer to Question 2 was "Yes," then answer this question*: Did the defamatory statement refer to (plaintiff)?

______________ Yes or No

4. *If your answer to Question 3 was "Yes," then answer this question*: Was (the statement or communication) published?

______________ Yes or No

5. *If your answer to Question 4 was "Yes," then answer this question:* By clear and convincing evidence, was (the statement or communication) made by (defendant) with actual malice?

______________ Yes or No

6. *If your answer to Question 5 was "No," then answer this question:* Was (defendant) negligent in the publication of the (statement or communication)?

______________ Yes or No

USE NOTE

If a plaintiff is connected to a matter that is of legitimate public concern, the constitutional standards in *Gertz* apply. The plaintiff is required to prove fault and actual damages in order to recover. If the plaintiff meets the actual malice standard of *New York Times*, however, the plaintiff is entitled to presumed damages and, if the appropriate statutory standard is met, punitive damages. Both fault and actual malice may be jury issues in an appropriate case. If the plaintiff seeks to prove actual malice, the *Harte-Hanks* admonition must be followed and the jury instructed periodically on the need to establish that requirement by clear and convincing evidence. If the plaintiff only seeks to prove fault (negligence) on the part of the defendant, then Questions 5, 6, and 7, covering actual malice and presumed damages, would not be used.

The jury should be instructed to answer the damages questions in CIVSVF 50.97 if it answered "Yes" to Question 5 on this verdict form, but in each case the special verdict questions on damages should require a showing that the damages were "directly caused" by the defamatory statement or communication.

If it answered "No" to Question 5 and "Yes" to Question 6, the jury should be instructed to answer the damages question, but damages would be presumed so the first two questions should ask what damages should be awarded "for the use of" the defamatory statement.

The special verdict questions and their supporting jury instructions are as follows:

1. CIVJIG 50.10: Defamatory Communication.
2. CIVJIG 50.25: Truth.
3. There is no jury instruction on the issue of whether the defamatory statement referred to the plaintiff. At the appropriate point in the instructions, the jurors should be informed that they will be asked to determine whether the statement or communication referred to the plaintiff. No jury instruction is necessary on the issue.
4. CIVJIG 50.15: Publication.
5. CIVJIG 50.40: Actual Malice—Constitutional Standard.
6. CIVJIG 50.45: Defamation—Negligence

AUTHORITIES

A plaintiff connected to a matter of legitimate public concern must prove the basic elements of defamation. In addition, the plaintiff must prove fault and actual damages. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). However, if the plaintiff meets the actual malice standard of *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), the plaintiff is entitled to recover presumed and punitive damages. The right to recover punitive damages is further limited in Minnesota by M.S.A. § 549.20.

In *Richie v. Paramount Pictures Corp.*, 544 N.W.2d 21, 27 (Minn.

1996), the Minnesota Supreme Court held that a plaintiff involved in a public issue may not recover for emotional harm absent injury to reputation.

CIVSVF 50.96

LIBEL—MATTER OF PUBLIC CONCERN—QUALIFIED PRIVILEGE

1. Was (the statement or communication) by (defendant) defamatory?

______________ Yes or No

2. Was (the statement or communication) false?

______________ Yes or No

3. *If your answer to Question 2 was "Yes," then answer this question*: Did the defamatory statement refer to (plaintiff)?

______________ Yes or No

4. *If your answer to Question 3 was "Yes," then answer this question*: Was (the statement or communication) published?

______________ Yes or No

5. *If your answer to Question 4 was "Yes," then answer this question:* By clear and convincing evidence, was (the statement or communication) published by (defendant) with actual malice?

______________ Yes or No

6. *If your Answer to Question 5 was "No," then answer the following question:* Was (defendant) negligent in the publication of the (statement) (communication)?

______________ Yes or No

7. *If your answer to either Question 5 or Question 6 was "Yes," then answer this question:* Was the (statement or communication) made by (defendant) for the purpose of injuring (plaintiff)?

______________ Yes or No

8. *If your answer to Question 7 was "Yes," then answer this question:* Was the (statement or communication) made by (defendant) with ill will and improper purposes or without regard for the consequences?

____
Yes or No

USE NOTE

This special verdict form is the same as CIVSVF 50.95, except that it adds a question on qualified privilege.

Where a qualified privilege attaches, and the issue is whether the plaintiff is able to overcome the privilege by a showing of common law "actual malice," there is great potential for jury confusion if the term "actual malice" is used to describe the showing the plaintiff must make to overcome the constitutional privilege and the same term is used to describe the showing the plaintiff must make to overcome the qualified privilege. Accordingly, this special verdict form, rather than using the term "actual malice" to determine whether the qualified privilege has been overcome, instead breaks the actual malice into its components to avoid the confusion that would otherwise exist were the jury to hear the term "actual malice" twice, but with different definitions.

The ordering of the first four questions follows the format suggested by the Minnesota Court of Appeals in *Schlieman v. Gannett Minnesota Broadcasting, Inc.*, 637 N.W.2d 297, 306 n.1 (Minn. Ct. App. 2001).

The jury should be instructed to answer the damages questions in CIVSVF 50.97 if it answered "Yes" to Question 5 on this verdict form and "Yes" to Question 8. General damages in that case will be presumed, so the damages questions should ask what damages should be awarded "for the use of" the defamatory statement.

If the jury answered "No" to Question 5 and "Yes" to Questions 6 and 8, the jury should be instructed to answer the damages question, but in each case the special verdict questions on damages should require a showing that the damages were "directly caused" by the defamatory statement or communication.

The special verdict questions and their supporting jury instructions are as follows:

1. CIVJIG 50.10: Defamatory Communication.
2. CIVJIG 50.25: Truth.

3. There is no jury instruction on the issue of whether the defamatory statement referred to the plaintiff. At the appropriate point in the instructions, the jurors should be informed that they will be asked to determine whether the statement or communication referred to the plaintiff. No jury instruction is necessary on the issue.

4. CIVJIG 50.15: Publication.

5. CIVJIG 50.40: Actual Malice—Constitutional Standard.

6. CIVJIG 50.45: Defamation—Negligence.

7. CIVJIG 50.35: Qualified Privilege—Abuse—Actual Malice (Common Law Standard).

8. CIVJIG 50.35: Qualified Privilege—Abuse—Actual Malice (Common Law Standard).

AUTHORITIES

A plaintiff connected to a matter of legitimate public concern must prove the basic elements of defamation. In addition, the plaintiff must prove fault and actual damages. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). However, if the plaintiff meets the actual malice standard of *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), the plaintiff is entitled to recover presumed and punitive damages. The right to recover punitive damages is further limited in Minnesota by M.S.A. § 549.20.

In *Richie v. Paramount Pictures Corp.*, 544 N.W.2d 21, 27 (Minn. 1996), the Minnesota Supreme Court held that a plaintiff involved in a public issue may not recover for emotional harm absent injury to reputation.

The existence of a qualified privilege is a question of law for the court, but once the privilege attaches, the plaintiff has the burden of proving that the privilege was abused. *Cavanaugh v. Burlington Northern Railroad Co.*, 941 F.Supp. 872, 879 (D.Minn. 1996); *Lewis v. Equitable Life Assurance Soc.*, 389 N.W.2d 876, 890 (Minn. 1986); *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 257 (Minn. 1980); *Rudebeck v. Paulson*, 612 N.W.2d 450 (Minn. Ct. App. 2000) rev. denied (Minn. Sept. 13, 2000). The abuse issue is generally for the jury. *See Phipps v. Clark Oil & Ref. Corp.*, 408 N.W.2d 569, 574 (Minn. 1987). The malice requirement can be met if the evidence provides a basis for "an inference that the defendant knew the statement was false by extrinsic evidence of ill feeling, or intrinsic evidence such as exaggerated language or the extent of publication." *Wallin v. Minnesota Dep't of Corrections*, 598 N.W.2d 393, 402 (Minn. Ct. App. 1999), rev. denied (Minn. Oct. 21, 1999).

CIVSVF 50.97

DAMAGES

1. What amount of money will fairly and adequately compensate (plaintiff) for damages [for the use of] [directly caused by] the (statement or communication), up to the time of this verdict, for:

a. harm to (his/her) reputation $________
b. Mental distress $________
c. Humiliation $________
d. Embarrassment? $________

2. What amount of money will fairly and adequately compensate (plaintiff) for damages in the future [for the use of] [directly caused by] the (statement or communication), for:

a. harm to (his/her) reputation $________
b. Mental distress $________
c. Humiliation $________
d. Embarrassment $________

3. What amount of money will fairly and adequately compensate (plaintiff) for damages directly caused by the (statement or communication), up to the time of this verdict, for:

a. Past wage loss $________
b. Past health care expenses $________

4. What amount of money will fairly and adequately compensate (plaintiff) for damages reasonably certain to occur in the future, directly caused by the (statement or communication), up to the time of this verdict, for:

a. Loss of future earning capacity? $________
b. Future health care expenses? $________

USE NOTE

The damages questions in the special verdict forms should distinguish between presumed and special damages. Presumed damages will be available in (1) defamation cases in which the plaintiff's claim is for libel; (2) defamation cases in which the claims are brought by public officials or figures or private persons involved in matters of public concern, if the *New York Times* actual malice standard is met; and (3) cases where the claim is for slander, including slander *per se* claims as well as cases where the plaintiff is unable to establish slander *per se* but establishes special damages. In presumed damages cases the plaintiff is not required to prove actual harm to reputation or actual emotional harm in order to recover. *See* CIVJIG 50.50. In cases involving special damages the plaintiff will have to establish that the defamatory statement directly caused that damage.

These special verdict questions on damages should be added to the special verdict forms on liability. Which questions are used will depend on two primary factors. One is whether the claim is for libel or slander. The other is whether First Amendment considerations limit the plaintiff's claim.

In questions 1 and 2, use damages "for the use of" the statement or communication in cases involving presumed damages and damages "directly caused by" the statement or communication for cases where the plaintiff has to prove actual damages.

In questions 3 and 4, covering special damages, the plaintiff will always have to prove that the damages were "directly caused by" the defamatory statement or communication.

CATEGORY 52

EMINENT DOMAIN

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SPECIAL VERDICT FORMS

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INTRODUCTORY NOTE

M.S.A. Const. Art. 1, § 13, provides that "[p]rivate property shall not be taken, destroyed, or damaged for public use without just compensation therefor, first paid or secured." "Taking" and "all words and phrases of like import include every interference, under the right of eminent domain, with the possession, enjoyment, or value of private property." M.S.A. § 117.025, subd. 2. Condemnation awards in the form of damages are in essence compensation for rights purchased by the condemning authority. *See City of Thief River Falls v. United Fire and Cas. Co.*, 336 N.W.2d 274, 276 (Minn. 1983). Property owners are entitled to just compensation for property taken, destroyed, or damaged for public use. *See Alexandria Lake Area Serv. Region v. Johnson*, 295

N.W.2d 588, 590 (Minn. 1980). The intent of Minnesota law is to fully compensate its citizens for losses related to property rights incurred because of state actions. *County of Anoka v. Blaine Bldg. Corp.*, 566 N.W.2d 331, 334 (Minn. 1997).

"Before condemning private land, a condemning authority. . . must determine that there is a public use for the land and that the taking is reasonably necessary or convenient for the furtherance of that public use." *Lundell v. Cooperative Power Ass'n*, 707 N.W.2d 376, 380 (Minn. 2006), *citing City of Duluth v. State*, 390 N.W.2d 757, 762–65 (Minn. 1986). In *Kelo v. City of New London*, 545 U.S. 469, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005), owners of condemned property challenged the city's taking of their property pursuant to an economic development plan on the grounds that the taking was not for a public purpose. The Supreme Court stated:

> Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us . . . to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment.

Kelo, 545 U.S. at 484, 125 S.Ct. at 2665. The Supreme Court declined to adopt a bright-line rule that economic development does not qualify as a public use, stating "there is no basis for exempting economic development from our traditionally broad understanding of public purpose." *Kelo*, 545 U.S. at 485, 125 S.Ct. at 2665–66. Following the *Kelo* decision the Minnesota Legislature made significant amendments to the statutes governing eminent domain, including the amendment of the statutory definition of "public use" or "public purpose." M.S.A. § 117.025, subd. 11. In *State ex rel. Com'r of Transp. v. Kettleson*, 801 N.W.2d 160 (Minn. 2011), the supreme court held that construction of a new access road "falls squarely within the meaning" of the new statutory definition for "public use." The court noted that the highway improvement is a transportation plan with the over-arching purpose of providing a public benefit, and the condemnation petition does not seek to transfer any land to a private party. Moreover, "the evidence at the hearing demonstrates that the enjoyment of the access road is established to be for the general public." *State ex rel. Com'r of Transp.* 801 N.W.2d at 166.

Definition of Taking. As a general rule, a government regulation will not normally constitute a taking. However, where land use regulations are designed to benefit a specific public or governmental enterprise, there must be compensation to the land owners whose property has suffered a substantial and measurable decline in market value as a result of the regulation. *Spaeth v. City of Plymouth*, 344 N.W.2d 815, 821 (Minn. 1984); *Pratt v. State Dept. of Natural Resources*, 309 N.W.2d

767, 773 (Minn. 1981); *McShane v. Faribault*, 292 N.W.2d 253, 258–59 (Minn. 1980). A reviewing court must look to the nature of the regulation with an eye on its purpose and the probability of achieving that purpose with this regulation.

To determine whether a regulation results in a compensable taking, the court must balance the harm posed to society by the unregulated use of land against the impact of regulation upon the usability of land. *Krahl v. Nine Mile Creek Watershed Dist.*, 283 N.W.2d 538, 543 (Minn. 1979). Necessity as well as public purpose must be shown. Absolute necessity is not required, however. It is sufficient if the proposed taking is reasonably necessary or convenient for purposes of furthering a proper purpose. *See City of Duluth v. State*, 390 N.W.2d 757, 764–65 (Minn. 1986).

Not every economic, social, or other interest or advantage is a property right, the taking of which must be compensated. But when interference reaches the point where it deprives the owner of the practical enjoyment of his property and causes a definite and measurable decrease in property market value, it is reasonable to assume that a property right has been taken or damaged, for which compensation must be paid. *See Wilson v. Ramacher*, 352 N.W.2d 389, 394 (Minn. 1984); *Alevizos v. Metropolitan Airports Comm'n*, 298 Minn. 471, 487, 216 N.W.2d 651, 661–662 (1974). Whether an invasion is permanent is a question of degree. Permanent refers to a servitude of indefinite duration, even if intermittent. *See Spaeth v. Plymouth*, 344 N.W.2d 815, 822 (Minn. 1984); *Vern Reynolds Const., Inc. v. City of Champlin*, 539 N.W.2d 614, 619 (Minn. Ct. App. 1995). The court of appeals, in *In re Rapp*, 621 N.W.2d 781 (Minn. Ct. App. 2001), considered a condemnation of land pursuant to M.S.A. §§ 163.11–.12 (1998), a statute governing the establishment of county highways. The court ruled that these statutory sections provided for the condemnation of land without providing for a pre-taking judicial review of the public purpose and necessity of a condemnation. As such, the court held that M.S.A. § 163.12, subds. 7, 10 violated the Fifth Amendment to the United States Constitution and Article I, section 13 of the Minnesota Constitution. *In re Rapp*, 621 N.W.2d at 787.

In *Zeman v. City of Minneapolis*, 552 N.W.2d 548 (Minn. 1996), the issue was whether the revocation of the plaintiff's rental dwelling license pursuant to a city ordinance authorizing the revocation following three instances of "disorderly use" was a taking within the meaning of the Minnesota and United States Constitutions. The court concluded that the appropriate analysis was under *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.E.2d 631 (1978), and that there is not a taking by a general property regulation "unless the property owner demonstrates that the regulation has resulted in a severe economic loss to the property owner and that the government action is not rationally related to any legitimate governmental interest." 552 N.W.2d at 553, citing John E. Nowak and Ronald D. Rotunda, Constitutional Law 464 (5th ed. 1995). Applying *Penn Central*, the court concluded that the first two factors, involving the impact of the regulation on the person who suffers the loss, and "the extent to which the regulation interferes with distinctive investment backed expectations," supported the plaintiff's claim of substantial economic impact. However, the court concluded that application of the third factor was conclusive:

> Under this factor, we must examine the regulation at issue, with emphasis on its purpose and the possibility of achieving that purpose with this regulation. While this is always an important consideration in a takings analysis, in cases involving a regulation aimed at the protection of the public health and safety, it becomes paramount. If the state regulation appears genuinely designed to prevent harm to the public and is likely to achieve that goal and the harm suffered by the property owner does not appear to be one that should be borne by the entire community, we will not find a taking . . . .

552 N.W.2d at 554 (citations omitted). The court concluded that under *Penn Central*, the revocation of plaintiff's rental dwelling license did not constitute a taking.

In *614 Company v. Minneapolis Community Development Agency*, 547 N.W.2d 400 (Minn. Ct. App. 1996), the court noted the changing standards in takings law, after the Supreme Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992):

> Lucas established a new breadth of judicial action in defense of Fifth Amendment rights and mandated compensation for an imprecisely defined variety of partial takings . . . . Compensation for a taking is now required solely upon a showing that the public regulatory action deprives the landowners of "all economically beneficial or productive use" of its land . . . . Variously, the Supreme Court substituted "economically viable," "economically feasible," "economically valuable," or simply "productive" or "developmental" in its description of the uses that could no longer be taken without compensation . . . . Moreover, the court interchanged "use" with "uses" and use "options" . . . .
>
> Lucas calls for compensation based on loss of economic value. It views property in terms of uses or options for use and requires that the uses, seemingly each of them if more than one be examined for lack of economic benefit. Although not including "unprofitable" in its litany of words tied to the concept of economic use of property, the court (a) uses the synonym "beneficial," (b) speaks of developmental and productive uses, and (c) deals with a trial court finding that evidently equated "valueless" with the loss of the most profitable use . . . .
>
> [I]t is also significant that in Lucas, the amendments to the state land-use law which prohibited construction of a home on Lucas's property may also have reduced potential damage to Lucas's land

> . . . . Addressing that change of law, the Supreme Court observed as a settled matter of law that "temporary deprivations" are compensable under the Takings Clause.

547 N.W.2d at 405–06.

In *Arcadia Development Corp. v. City of Bloomington*, 552 N.W.2d 281 (Minn. Ct. App. 1996), rev. denied (Minn. Oct. 29, 1996), the court of appeals considered the appropriate standard for determining whether there was a taking. That case involved the adoption by Bloomington of an ordinance that required mobile home park owners who closed their parks to pay relocation costs to their residents. Applying *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994), the court of appeals concluded that because the challenge was to a citywide, legislative land-use regulation, there was not a taking because the ordinance substantially advanced legitimate state interests. 552 N.W.2d at 286. The court of appeals rejected a more onerous standard, also announced in *Dolan*, which is applicable "only to adjudicative determinations conditioning approval of a proposed land use on a property transfer to the government, which, standing alone, would clearly constitute a taking." 552 N.W.2d at 286. In such cases, "the government must make an individualized determination establishing that compliance with governmental conditions bear a 'rough proportionality,' in both nature and extent, to the impact of those conditions." 552 N.W.2d at 286.

Temporary, minimal intrusions that do not substantially interfere with property rights do not rise to the level of constitutional taking. *See Haeussler v. Braun*, 314 N.W.2d 4, 9 (Minn. 1981); *State by Waste Management Bd. v. Bruesehoff*, 343 N.W.2d 292, 295 (Minn. Ct. App. 1984). In *Wegner v. Milwaukee Mut. Ins. Co.*, 479 N.W.2d 38, 41–42 (Minn. 1991), the supreme court held that "where an innocent third party's property is damaged by the police in the course of apprehending a suspect, that property is damaged within the meaning of [Article I, § 13 of] the constitution," necessitating compensation for the damage.

Questions for the Jury. The central—if not exclusive—issue for decision by the trier of fact in an eminent domain case is damages. When a condemnation action is tried *de novo* before a jury, the only issue for the jury to consider is damages. If faced with the issue, the court should decide whether the government entity has the authority for the taking, that is, whether there is a public purpose for the taking. *State v. Wren Inc.*, 275 Minn. 259, 146 N.W.2d 547, 550 (1966); M.S.A. § 117.075. Likewise, when an inverse condemnation case is tried *de novo* before a jury, the only issue for the jury to consider is damages. The court should determine whether there has been a taking, and whether there is a public purpose for that taking. *See City of Mankato v. Hilgers*, 313 N.W.2d 610, 612 (Minn. 1981); *Alevizos v. Metropolitan Airports Comm'n*, 298 Minn. 471, 484, 216 N.W.2d 651, 661 (1974); *State by Mondale v. McAndrews*, 286 Minn. 115, 116, 175 N.W.2d 492, 493 (1970). The question as to whether the land has been damaged so as to require condemnation is a question of law that the trial court must decide before submitting the damage question to the commissioners. *City of Mankato v. Hilgers*, 313 N.W.2d 610, 612 (Minn. 1981); and *State by Mattson v. Prow's Motel, Inc.*, 285 Minn. 1, 4, 171 N.W.2d 83, 85 (1969).

Fair Market Value. In determining just compensation, or its equivalent, market value, consideration of facts or circumstances that do not reasonably affect market value are to be excluded. *See Olson v. United States*, 292 U.S. 246, 257 54 S.Ct. 704, 709 78 L.Ed. 1236 (1934); *Minneapolis-St. Paul Sanitary Dist. v. Fitzpatrick*, 201 Minn. 442, 277 N.W. 394 (1937). To determine the fair market value of property in a condemnation proceeding, any competent evidence may be considered if it legitimately bears upon the market value of the property. *See State by Humphrey v. Strom*, 493 N.W.2d 554, 558 (Minn. 1992) (*quoting Ramsey County v. Miller*, 316 N.W.2d 917, 919 (Minn. 1982)). The measure of compensation is the amount of money a purchaser willing but not required to buy the property would pay to an owner willing but not required to sell it, taking into consideration the highest and best use to which the property can be put. *See Ramsey County v. Miller*, 316 N.W.2d 917, 919 (Minn. 1982). *See Housing and Redev. Auth. of St. Paul v. Kieffer Bros. Invest. and Constr. Co.*, 284 Minn. 516, 520–21, 170 N.W.2d 862, 864 (1969); 4 Nichols on Eminent Domain § 12.2 (1981). However, a condemnee cannot benefit from the prospective increase in land value that will result from the construction of a public project. *See First American National Bank v. State*, 322 N.W.2d 344, 346 (Minn. 1982).

There are three acceptable methods for determining market value: (1) market data based on comparable sales; (2) reproduction or replacement costs less depreciation; and (3) income capitalization—the value of the land plus the value of improvements arrived at by capitalization. *See Ramsey County v. Miller*, 316 N.W.2d 917, 919 (Minn. 1982). While evidence concerning development costs is admissible, the court in *Miller* stated that "specific numerical, analytical and illustrative evidence supporting the development cost approach appraisal will be allowed only if the party introducing such evidence can lay a proper foundation to show that (a) the land is ripe for development; (b) the owner can reasonably expect to secure the necessary zoning and other permits required for the development to take place; and (c) the development will not take place at too remote a time." 316 N.W.2d at 922. Development plans may also be considered where they are more than mere speculation. *See City of St. Paul v. Rein Recreation, Inc.*, 298 N.W.2d 46, 51 (Minn. 1980).

Generally, one is not entitled to recover compensation of a going concern as a part of a compensation award. *See City of Minneapolis v. Schutt*, 256 N.W.2d 260, 261–262 (Minn. 1977); *People Pleasing of Minnesota, Inc. v. State, by Humphrey*, 1994 WL 62145 (Minn. Ct. App. 1994). A party may be entitled to compensation for a going concern in a condemnation proceeding where the holder of the interest can demonstrate: (1) that the going-concern value will in fact be destroyed as a direct result of the condemnation, and (2) that the business cannot be relocated as a practical matter, or that relocation would result in irreparable harm to the interest. *See Housing and Redev. Auth. of the City of St. Paul v. Naegele Outdoor Ad. Co. of the Twin Cities, Inc.*, 282 N.W.2d 537, 538–39 (Minn. 1979).

The condemnee is entitled to the value of the condemned property for the most advantageous use to which it may be applied, even though it has never been so used, and even though the owner has no intention of devoting it to such use. *See Mississippi & Rum River Boom Co. v. Patterson, 98 U.S. (8 Otto) 403*, 25 L.Ed. 206 (1878); *State by Humphrey v. Strom*, 493 N.W.2d 554, 559 (Minn. 1992); *Board of Educ. of Minneapolis v. Heywood Mfg. Co.*, 154 Minn. 486, 488, 192 N.W. 102, 102–03 (1923); *City of Ely v. Conan*, 91 Minn. 127, 130, 97 N.W. 737, 739 (1903).

Neither the value to or necessities of the condemnor are a measure of value. The issue is the loss to the owner, not the gain to the taker. *See State by Spannaus v. Dangers*, 312 N.W.2d 668, 673 (Minn. 1981); *Minneapolis-St. Paul Sanitary Dist. v. Fitzpatrick*, 201 Minn. 442, 453, 277 N.W. 394, 400 (1937); *Stinson v. Chicago, St. P. & M. Ry. Co.*, 27 Minn. 284, 291, 6 N.W. 784, 787 (1880).

The admission in evidence of the owner's purchase price is within the discretion of the court. *See Village of Maplewood, Ramsey County v. Johnson*, 303 Minn. 485, 487, 228 N.W.2d 269, 270 (1975); *State by Mondale v. Larson*, 285 Minn. 467, 472, 174 N.W.2d 114, 117 (1970). The owner's investment, within the court's discretion, may be an element to be taken into consideration in determining market value. *See Brooks-Scanlon Corp. v. United States*, 265 U.S. 106, 122, 44 S.Ct. 471, 474, 68 L.Ed. 934 (1924); *In re Delinquent Real Estate Taxes*, 164 Minn. 522, 523, 204 N.W. 640, 641 (1925).

Interference with access to an abutting roadway may be a compensable taking. While property owners have no vested interest in the continued flow of traffic past the property, *Hendrickson v. State*, 267 Minn. 436, 442, 127 N.W.2d 165, 170 (1964), property owners do have a right of "reasonably convenient and suitable access" to a public street or highway that abuts their property. This right is in the nature of a property right. *Johnson v. City of Plymouth*, 263 N.W.2d 603, 605 (Minn. 1978); *Grossman Inv. v. State*, 571 N.W.2d 47 (Minn. Ct. App. 1997). *See also State by Mondale v. Gannons, Inc.*, 275 Minn. 14, 19, 145 N.W.2d 321, 326 (1966); *Hendrickson*, 267 Minn. at 445–46, 127 N.W.2d at 172–173.

CIVJIG 52.10

EMINENT DOMAIN—INTRODUCTORY STATEMENT

Authorized entity's right to take property or rights to property

> The constitution and laws of this state allow property to be taken by (an authorized entity) for public use. This right to take is referred to as "eminent domain" or "condemnation." It has been decided that this property was taken for public use. Do not concern yourselves with the reasons for this.

The owner's right to compensation

> The constitution and laws of this state also give the owner the right to just compensation for property.
>
> > It is your duty to decide the amount of money the owner is entitled to as just compensation as of (the date of the taking). Do not consider the fact that (an authorized entity) is taking a private citizen's property or property rights. Decide this case exactly the same way you would if both parties were private citizens.

USE NOTE

Condemnation. When a condemnation action is tried *de novo* before a jury, the only issue for the jury to consider is damages. If faced with the issue, the court should decide whether the government entity has the authority for the taking, that is, whether there is a public purpose for the taking. *State v. Wren Inc.*, 275 Minn. 259, 146 N.W.2d 547, 550 (1966); M.S.A. § 117.075.

Inverse Condemnation. When an inverse condemnation case is tried *de novo* before a jury, the only issue for the jury to consider is damages. The court should determine whether there has been a taking, and whether there is a public purpose for that taking. *See City of Mankato v. Hilgers*, 313 N.W.2d 610, 612 (Minn. 1981); *Alevizos v. Metropolitan Airports Comm'n*, 298 Minn. 471, 484, 216 N.W.2d 651, 661 (1974); *State by Mondale v. McAndrews*, 286 Minn. 115, 116, 175 N.W.2d 492, 493 (1970). The question as to whether the land has been damaged so as to require condemnation is a question of law that the trial court must decide before submitting the damage question to the commissioners. *City of Mankato v. Hilgers*, 313 N.W.2d 610, 612 (Minn.

1981); and *State by Mattson v. Prow's Motel, Inc.*, 285 Minn. 1, 171 N.W.2d 83 (1969).

AUTHORITIES

M.S.A. Const. Art. 1, § 13, provides that "[p]rivate property shall not be taken, destroyed, or damaged for public use without just compensation therefor, first paid or secured." "Taking" and all words and phrases of like import include every interference, under the right of eminent domain, with the possession, enjoyment, or value of private property. M.S.A. § 117.025, subd. 2.

Condemnation awards in the form of damages are in essence compensation for rights purchased by the condemning authority. *See City of Thief River Falls v. United Fire and Cas. Co.*, 336 N.W.2d 274, 276 (Minn. 1983). Property owners are entitled to just compensation for property taken, destroyed, or damaged for public use. *See Alexandria Lake Area Serv. Region v. Johnson*, 295 N.W.2d 588, 590 (Minn. 1980). The intent of Minnesota law is to fully compensate its citizens for losses related to property rights incurred because of state actions. *County of Anoka v. Blaine Bldg. Corp.*, 566 N.W.2d 331, 334 (Minn. 1997).

As a general rule, a government regulation will not normally constitute a taking. However, where land use regulations are designed to benefit a specific public or governmental enterprise, there must be compensation to the land owners whose property has suffered a substantial and measurable decline in market value as a result of the regulation. *Spaeth v. City of Plymouth*, 344 N.W.2d 815, 821 (Minn. 1984); *Pratt v. State Dept. of Natural Resources*, 309 N.W.2d 767, 773 (Minn. 1981); *see McShane v. Faribault*, 292 N.W.2d 253, 258–259 (Minn. 1980). A reviewing court must look to the nature of the regulation with an eye on its purpose and the probability of achieving that purpose with this regulation. *See, e.g., DeCook v. Rochester Intern. Airport Joint Zoning Bd.*, 796 N.W.2d 299, 307 (Minn. 2011) (holding that McShane "provides the appropriate analysis to determine whether the enactment of an airport ordinance restricting land use within runway safety zones amounts to a regulatory taking under the Minnesota Constitution").

To determine whether a regulation results in a compensable taking, the court must balance the harm posed to society by the unregulated use of land against the impact of regulation upon the usability of land. *Krahl v. Nine Mile Creek Watershed Dist.*, 283 N.W.2d 538, 543 (Minn. 1979). Necessity as well as public purpose must be shown. Absolute necessity is not required, however. It is sufficient if the proposed taking is reasonably necessary or convenient for purposes of furthering a proper purpose. *See City of Duluth v. State*, 390 N.W.2d 757, 764–765 (Minn. 1986).

Not every economic, social, or other interest or advantage is a property right, the taking of which must be compensated. But when interference reaches the point where it deprives the owner of the practical enjoyment of his property and causes a definite and measurable decrease in property market value, it is reasonable to assume that a property right has been taken or damaged, for which compensation must be paid. *See Wilson v. Ramacher*, 352 N.W.2d 389, 394 (Minn. 1984); *Alevizos v. Metropolitan Airports Comm'n*, 298 Minn. 471, 487, 216 N.W.2d 651, 661–662 (1974). Whether an invasion is permanent is a question of degree. Permanent refers to a servitude of indefinite duration, even if intermittent. *See Spaeth v. Plymouth*, 344 N.W.2d 815, 822 (Minn. 1984); *Vern Reynolds Const., Inc. v. City of Champlin*, 539 N.W.2d 614, 619 (Minn. Ct. App. 1995).

Research References

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CIVJIG 52.15

TAKING—INTRODUCTORY STATEMENT

Definition of a "taking"

> A "taking" occurs when (an authorized entity) uses its right of eminent domain to interfere with the possession, enjoyment, or value of private property.
>
> [I have already decided that a "taking" has occurred.]

AUTHORITIES

"Taking" and "all words and phrases of like import include every interference, under the right of eminent domain, with the possession, enjoyment, or value of private property." M.S.A. § 117.025, subd. 2. The realization of damages does not give rise to a right to bring an inverse condemnation action. Instead, it is the interference with the property right that justifies the action. *See Beer v. Minnesota Power & Light Co.*, 400 N.W.2d 732 (Minn. 1987).

In *Zeman v. City of Minneapolis*, 552 N.W.2d 548 (Minn. 1996), the issue was whether the revocation of the plaintiff's rental dwelling license pursuant to a city ordinance authorizing the revocation following three instances of "disorderly use" was a taking within the meaning of the Minnesota and United States Constitutions. The court concluded that the appropriate analysis was under *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.E.2d 631 (1978), and that there is not a taking by a general property regulation "unless the property owner demonstrates that the regulation has resulted in a severe economic loss to the property owner and that the government action is not rationally related to any legitimate governmental interest." 552 N.W.2d at 553, citing John E. Nowak and Ronald D. Rotunda, Constitutional Law 464 (5th ed. 1995). Applying *Penn Central*, the court concluded that the first two factors, involving the impact of the regulation on the person who suffers the loss, and "the extent to which the regulation interferes with distinctive investment backed expectations," supported the plaintiff's claim of substantial economic impact. However, the court concluded that application of the third factor was conclusive:

> Under this factor, we must examine the regulation at issue, with emphasis on its purpose and the possibility of achieving that purpose with this regulation. While this is always an important consideration in a takings analysis, in cases involving a regulation aimed at the protection of the public health and safety, it becomes paramount. If the state regulation appears genuinely designed to prevent harm to the public and is likely to achieve that goal and

> the harm suffered by the property owner does not appear to be one that should be borne by the entire community, we will not find a taking . . . .

552 N.W.2d at 554 (citations omitted). The court concluded that under *Penn Central*, the revocation of plaintiff's rental dwelling license did not constitute a taking.

In *614 Company v. Minneapolis Community Development Agency*, 547 N.W.2d 400 (Minn. Ct. App. 1996), the court noted the changing standards in takings law after the Supreme Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992):

> Lucas established a new breadth of judicial action in defense of Fifth Amendment rights and mandated compensation for an imprecisely defined variety of partial takings . . . . Compensation for a taking is now required solely upon a showing that the public regulatory action deprives the landowners of "all economically beneficial or productive use" of its land . . . . Variously, the Supreme Court substituted "economically viable," "economically feasible," "economically valuable," or simply "productive" or "developmental" in its description of the uses that could no longer be taken without compensation . . . . Moreover, the court interchanged "use" with "uses" and use "options" . . . .
>
> Lucas calls for compensation based on loss of economic value. It views property in terms of uses or options for use and requires that the uses, seemingly each of them if more than one be examined for lack of economic benefit. Although not including "unprofitable" in its litany of words tied to the concept of economic use of property, the court (a) uses the synonym "beneficial," (b) speaks of developmental and productive uses, and (c) deals with a trial court finding that evidently equated "valueless" with the loss of the most profitable use . . . .
>
> [I]t is also significant that in Lucas, the amendments to the state land-use law which prohibited construction of a home on Lucas's property may also have reduced potential damage to Lucas's land . . . . Addressing that change of law, the Supreme Court observed as a settled matter of law that "temporary deprivations" are compensable under the Takings Clause.

547 N.W.2d at 405–06.

In *Arcadia Development Corp. v. City of Bloomington*, 552 N.W.2d 281 (Minn. Ct. App. 1996), rev. denied (Minn. Oct. 29, 1996), the court of appeals considered the appropriate standard for determining whether there was a taking. That case involved the adoption by Bloomington of an ordinance that required mobile home park owners who closed their parks to pay relocation costs to their residents. Applying *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994), the court of appeals concluded that because the challenge was to a citywide, legislative land-use regulation, there was not a taking because the ordinance substantially advanced legitimate state interests. 552 N.W.2d at 286. The court of appeals rejected a more onerous standard, also announced in *Dolan*, which is applicable "only to adjudicative determinations conditioning approval of a proposed land use on a property transfer to the government, which, standing alone, would clearly constitute a taking." 552 N.W.2d at 286. In such cases, "the government must make an individualized determination establishing that compliance with governmental conditions bear a 'rough proportionality,' in both nature and extent, to the impact of those conditions." 552 N.W.2d at 286.

The supreme court has used a two-step test to determine whether there has been a constitutional taking in airport noise cases. The first step is to determine whether the noise constitutes a substantial invasion. The second step is to determine whether the invasion resulted in measurable diminution of market value. *See Alevizos v. Metropolitan Airports Comm'n*, 317 N.W.2d 352, 358 (Minn. 1982). Whether a specific change in market value constitutes a definite and measurable change is a legal question, but what that diminution actually is is a fact question. *See Keenan v. International Falls-Koochiching*, 357 N.W.2d 397, 399 (Minn. Ct. App. 1984). The landowner has the burden of proving measurable diminution of market value. Mere assertions are inadequate. *See* id. at 400.

Temporary, minimal intrusions that do not substantially interfere with property rights do not rise to the level of constitutional taking. *See Haeussler v. Braun*, 314 N.W.2d 4, 9 (Minn. 1981); *State by Waste Management Bd. v. Bruesehoff*, 343 N.W.2d 292, 295 (Minn. Ct. App. 1984). In *Wegner v. Milwaukee Mut. Ins. Co.*, 479 N.W.2d 38, 41–42 (Minn. 1991), the supreme court held that "where an innocent third party's property is damaged by the police in the course of apprehending a suspect, that property is damaged within the meaning of [Article I, § 13 of] the constitution," necessitating compensation for the damage.

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CIVJIG 52.20

COMMISSIONERS' AWARD

The procedure for condemnation

The court has appointed three commissioners to decide the damages due the (owner) (owners of separate interests).

The commissioners have filed their report with the court.

The report includes the amount of money the commissioners believe should be paid as just compensation as of (the date of the taking).

The parties have the right to appeal the commissioners' award to a jury if either is dissatisfied. You, as a jury, are to decide the amount of damages.

The commissioners' award

The award is one item of evidence you may consider in deciding just compensation.

Consider and weigh the award together with all of the other evidence.

You are not bound by the commissioners' award.

The commissioners' award does not limit you to maximum or minimum amounts.

AUTHORITIES

The commissioners are to be appointed by the court after the petition to condemn has been approved. M.S.A. § 117.075. Compensation for a taking is to be determined and damages assessed as of the date the commissioners file their award. *See City of Mankato v. Hilgers*, 313 N.W.2d 610, 612 (Minn. 1981); *State, by Lord v. Pahl*, 257 Minn. 177, 182, 100 N.W.2d 724, 728 (1960); *Iowa Elec. Light & Power Co. v. Fairmont*, 243 Minn. 176, 183, 67 N.W.2d 41, 46 (1954). A jury trial is provided for in M.S.A. § 117.165(1).

A commissioner in a condemnation proceeding may be called by any party as a witness to testify as to the amount and basis of the award of the commissioners, and may be examined and qualified as any other witness. M.S.A. § 117.175. Admissibility of the commissioner's opinion is ordinarily within the discretion of the court. *See Housing & Redev. Auth. v. Kieffer Bros. Inv. & Const. Co.*, 284 Minn. 516, 521, 170 N.W.2d 862, 864–865 (1969). An opinion of value by the commissioner, like that of other experts, is not binding upon the trier of fact. *See State by Lord v. Pearson*, 260 Minn. 477, 486, 110 N.W.2d 206, 213 (1961).

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CIVJIG 52.25

VIEW OF PREMISES—EVIDENCE OF VIEW

Purpose of viewing the property

You have seen the property in question.

The only purpose of the visit was to help you understand the evidence given in court.

USE NOTE

At the time the jury is permitted to view the premises, it is suggested that the following cautionary instruction be given to the jurors:

> You are not to discuss your view of the premises with your fellow jurors or any other person until your deliberations. You should not ask questions of the owners, attorneys, or parties while viewing the property. If you have a question, direct your question to the court, and I will answer it if the question is a legally proper question. You are not to view the property alone or on other occasions.

AUTHORITIES

A view of the premises, while generally permitted upon the request of a party, is within the discretion of the court. *See State by Humphrey v. Briggs*, 488 N.W.2d 811, 817 (Minn. Ct. App. 1992); *State, by Peterson v. Andrews*, 209 Minn. 578, 580, 297 N.W. 848, 850 (1941); *Minnesota Condemnation Law and Practice* § 9.03(J) (1993); 5 Nichols On Eminent Domain § 18.08 (1997). The purpose of the view is to allow the jury to understand and apply the evidence given in court.

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CIVJIG 52.30

BURDEN OF PROOF

Proof of just compensation

The owner must prove "just compensation."

USE NOTE

CIVJIG 52.35 should be given following this instruction.

For additional instruction on burden of proof, *see* CIVJIG 14.15, which may be adapted to this context.

The owner has the right to open and close the case. M.S.A. § 117.175, subd. 1; *Minneapolis-St. Paul Sanitary District v. Fitzpatrick*, 201 Minn. 442, 460, 277 N.W. 394, 403 (1937).

AUTHORITIES

The owner has the burden of establishing the damages claimed, as does a plaintiff in any other civil action. *See* M.S.A. § 117.175; *State by Lord v. Pearson*, 260 Minn. 477, 489, 110 N.W.2d 206, 215 (1961); *State by Spannaus v. Belmont, Holmberg*, 384 N.W.2d 214, 217 (Minn. Ct. App. 1986); *Stenger v. State*, 449 N.W.2d 483, 485 (Minn. Ct. App. 1989).

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CIVJIG 52.35

JUST COMPENSATION—TOTAL TAKING—DEFINITION

Definition of "just compensation"

> "Just compensation" is the fair market value of the property that was taken as of (date property taken).

USE NOTE

See CIVJIG 52.45 through 52.70 for instructions related to a partial taking and severance damages.

AUTHORITIES

The full and equivalent value for property taken is the market value of the property at the time of the taking, contemporaneously paid in money, *see Olson v. United States*, 292 U.S. 246, 255, 54 S.Ct. 704, 708, 78 L.Ed. 1236 (1934); *Minneapolis-St. Paul Sanitary Dist. v. Fitzpatrick*, 201 Minn. 442, 448, 277 N.W. 394, 398 (1937); but market value is not an absolute standard nor an exclusive measure of evaluation. *See United States v. Fuller*, 409 U.S. 488, 93 S.Ct. 801, 35 L.Ed.2d 16 (1973); *United States v. Cors*, 337 U.S. 325, 69 S.Ct. 1086, 93 L.Ed. 1392 (1949); *United States v. Miller*, 317 U.S. 369, 63 S.Ct. 276, 87 L.Ed. 336 (1943), reh. denied, 318 U.S. 798, 63 S.Ct. 557, 87 L.Ed. 1162 (1943).

Interest on a condemnation award is an element of just compensation. *See Fine v. City of Minneapolis*, 368 N.W.2d 324, 327 (Minn. Ct. App. 1985), decision affirmed in part, reversed in part, 391 N.W.2d 853 (Minn. 1986) (holding that, in the circumstances of that case, there was no equitable justification for including interest in the damage award).

Research References

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CIVJIG 52.40

FAIR MARKET VALUE

Definition of "fair market value"

"Fair market value" is the price that would be paid for the entire property by a willing buyer to a willing seller.

Consider all facts and circumstances that a buyer and seller in the open market would reasonably consider. The owner is entitled to the value based on the highest and best use of the property.

[Do not consider the fact that the owner may not have thought of this highest and best use.]

[Do not consider the value of the property to the (authorized entity) or its need for the property. Consider only what the owner has lost, not what the (authorized entity) has gained.]

[The owner's investment in the property is not necessarily the same as its fair market value. For example:

1. The owner may have acquired the property for more or less than it was worth.
2. There may have been changes in the property's value while the owner was holding it.]

AUTHORITIES

In determining just compensation, or its equivalent, market value, consideration of facts or circumstances that do not reasonably affect market value are to be excluded. *See Olson v. United States*, 292 U.S. 246, 257 54 S.Ct. 704, 709 78 L.Ed. 1236 (1934); *Minneapolis-St. Paul Sanitary Dist. v. Fitzpatrick*, 201 Minn. 442, 277 N.W. 394 (1937). To determine the fair market value of property in a condemnation proceeding, any competent evidence may be considered if it legitimately bears upon the market value of the property. *See State by Humphrey v. Strom*, 493 N.W.2d 554, 558 (Minn. 1992) (quoting *Ramsey County v. Miller*, 316 N.W.2d 917, 919 (Minn. 1982)). The measure of compensation is the amount of money a purchaser willing but not required to buy the property would pay to an owner willing but not required to sell it, taking into consideration the highest and best use to which the property can be put. *See Ramsey County v. Miller*, 316 N.W.2d 917, 919 (Minn. 1982). *See Housing and Redev. Auth. of St. Paul v. Kieffer Bros. Invest. and Constr. Co.*, 284 Minn. 516, 520–21, 170 N.W.2d 862, 864 (1969); 4 Nichols on Eminent Domain § 12.2 (1981). However, a condemnee cannot benefit from the prospective increase in land value that will result from the construction of a public project. *See First American National Bank v. State*, 322 N.W.2d 344, 346 (Minn. 1982).

There are three acceptable methods for determining market value: (1) market data based on comparable sales; (2) reproduction or replacement costs less depreciation; and (3) income capitalization—the value of the land plus the value of improvements arrived at by capitalization. *See Ramsey County v. Miller*, 316 N.W.2d 917, 919 (Minn. 1982). While evidence concerning development costs is admissible, the court in *Miller* stated that "specific numerical, analytical and illustrative evidence supporting the development cost approach appraisal will be allowed only if the party introducing such evidence can lay a proper foundation to show that (a) the land is ripe for development; (b) the owner can reasonably expect to secure the necessary zoning and other permits required for the development to take place; and (c) the development will not take place at too remote a time." 316 N.W.2d at 922. Development plans may also be considered where they are more than mere speculation. *See City of St. Paul v. Rein Recreation, Inc.*, 298 N.W.2d 46, 51 (Minn. 1980).

Generally, one is not entitled to recover compensation of a going concern as a part of a compensation award. *See City of Minneapolis v. Schutt*, 256 N.W.2d 260, 261–262 (Minn. 1977); *People Pleasing of Minnesota, Inc. v. State, by Humphrey*, 1994 WL 62145, *2 (Minn. Ct. App. 1994). A party may be entitled to compensation for a going concern in a condemnation proceeding where the holder of the interest can demonstrate: (1) that the going-concern value will in fact be destroyed as a direct result of the condemnation, and (2) that the business cannot be relocated as a practical matter, or that relocation would result in irreparable harm to the interest. *See Housing and Redev. Auth. of the City of St. Paul v. Naegele Outdoor Ad. Co. of the Twin Cities, Inc.*, 282 N.W.2d 537, 538–539 (Minn. 1979).

The condemnee is entitled to the value of the condemned property for the most advantageous use to which it may be applied, even though it has never been so used, and even though the owner has no intention of devoting it to such use. *See Mississippi & Rum River Boom Co. v. Patterson, 98 U.S. (8 Otto) 403*, 25 L.Ed. 206 (1878); *State by Humphrey v. Strom*, 493 N.W.2d 554, 559 (Minn. 1992); *Board of Educ. of Minneapolis v. Heywood Mfg. Co.*, 154 Minn. 486, 488, 192 N.W. 102, 102–103 (1923); *City of Ely v. Conan*, 91 Minn. 127, 130, 97 N.W. 737, 739 (1903).

Neither the value to or necessities of the condemnor are a measure of value. The issue is the loss to the owner, not the gain to the taker. *See State by Spannaus v. Dangers*, 312 N.W.2d 668, 673 (Minn. 1981); *Minneapolis-St. Paul Sanitary Dist. v. Fitzpatrick*, 201 Minn. 442, 453, 277 N.W. 394, 400 (1937); *Stinson v. Chicago, St. P. & M. Ry. Co.*, 27 Minn. 284, 291, 6 N.W. 784, 787 (1880).

The admission in evidence of the owner's purchase price is within the discretion of the court. *See Village of Maplewood, Ramsey County v. Johnson*, 303 Minn. 485, 487, 228 N.W.2d 269, 270 (1975); *State by Mondale v. Larson*, 285 Minn. 467, 472, 174 N.W.2d 114, 117 (1970). The owner's investment, within the court's discretion, may be an element to be taken into consideration in determining market value. *See Brooks-Scanlon Corp. v. United States*, 265 U.S. 106, 122, 44 S.Ct. 471, 474, 68 L.Ed. 934 (1924); *In re Delinquent Real Estate Taxes*, 164 Minn. 522, 523, 204 N.W. 640, 641 (1925).

Interference with access to an abutting roadway may be a compensable taking. While property owners have no vested interest in the continued flow of traffic past the property, *Hendrickson v. State*, 267 Minn. 436, 442, 127 N.W.2d 165, 170 (1964), property owners do have a right of "reasonably convenient and suitable access" to a public street or highway that abuts their property. This right is in the nature of a property right. *Johnson v. City of Plymouth*, 263 N.W.2d 603, 605 (Minn. 1978); *Grossman Inv. v. State*, 571 N.W.2d 47 (Minn. Ct. App. 1997). *See also State by Mondale v. Gannons, Inc.*, 275 Minn. 14, 19, 145 N.W.2d 321, 326 (1966); *Hendrickson*, 267 Minn. at 445–446, 127 N.W.2d at 172–173.

Thus, a property owner suffers compensable damage when the roadway is changed in such a way that the owner is denied reasonably convenient and suitable access to the main thoroughfare in at least one direction. *Gannons*, 275 Minn. at 19, 145 N.W.2d at 326 (*citing Hendrickson*, 267 Minn. at 436, 127 N.W.2d at 167). *See also Recke v. State*, 298 Minn. 500, 502, 215 N.W.2d 786, 788 (1974). The law is well settled that the dividing of a roadway by median strips or dividers cannot be made the subject of compensation in condemnation, where, as a result, a property owner loses traffic access in one direction, but retains access in the other. *Gannons*, 275 Minn. at 23, 145 N.W.2d at 329. Therefore, the loss of access may not be the basis of severance damages where a property owner is subject to a partial taking and coincidentally loses access due to the construction of a median barrier. Evidence of loss of access in one direction resulting from the construction of a median is not relevant and not admissible. *County of Anoka v. Blaine Building Corp.*, 566 N.W.2d 331, 336 (Minn. 1997).

Research References

West's Key Number Digest
Eminent Domain ⚷149, 202

CIVJIG 52.45

TAKING OF ACCESS RIGHTS

Taking access rights

If you find that access to the property has been taken or changed, you may consider:

1. Whether this taking or change caused inconvenience in the use and enjoyment of the rest of the property, and
2. Whether the inconvenience and loss of use or enjoyment affected the fair market value of the entire property or the part that was left.

AUTHORITIES

A property owner is entitled to damages for a constitutional taking by the state of the right of reasonable, suitable, and convenient access to and from the owner's property. *See State by Mattson v. Prow's Motel, Inc.*, 285 Minn. 1, 4, 171 N.W.2d 83, 85 (1969); *Hendrickson v. State*, 267 Minn. 436, 443, 127 N.W.2d 165, 170 (1964). A landowner is entitled to compensation where the owner's direct right of access is taken, even though other but less satisfactory means of access are made available. *See City of St. Louis Park v. The Almor Co.*, 313 N.W.2d 606, 608 (Minn. 1981); *Johnson Bros. Grocery, Inc. v. State Department of Highways*, 304 Minn. 75, 78, 229 N.W.2d 504, 505 (1975); *City of Chisago City v. Holt*, 360 N.W.2d 390, 392 (Minn. Ct. App. 1985). Whether an owner has sustained damages by way of a condemnor's denial of or interference with access is a fact question. *See State by Lord v. Kohler*, 268 Minn. 77, 81, 128 N.W.2d 90, 93 (1964).

The law is well settled that the dividing of a roadway by median strips or dividers cannot be made the subject of compensation in condemnation, where, as a result, a property owner loses traffic access in one direction, but retains access in the other. *State by Mondale v. Gannons, Inc.*, 275 Minn. 14, 23, 145 N.W.2d 321, 329 (1966). Therefore, the loss of access may not be the basis of severance damages where a property owner is subject to a partial taking and coincidentally loses access due to the construction of a median barrier. Evidence of loss of access in one direction resulting from the construction of a median is not relevant and not admissible. *County of Anoka v. Blaine Building Corp.*, 566 N.W.2d 331, 336 (Minn. 1997).

The right of access to a public highway from abutting property is subject to eminent domain law. The right of access may be taken for public use, but only upon payment of just compensation. *See Beer v. Minnesota Power & Light Co.*, 400 N.W.2d 732, 734 (Minn. 1987).

In *Dale Properties, LLC v. State of Minnesota*, 638 N.W.2d 763, 767 (Minn. 2002), the supreme court concluded that the closure of a highway median crossover constitutes a noncompensable exercise of the state's police power when an abutting property owner loses traffic access in one direction, but retains access in the other direction. In his concurrence, however, Justice Paul Anderson was not willing "to state as an absolute rule that, as a matter of law, there never can be a compensable taking when a median crossover is closed." 638 N.W.2d at 768–69 (Paul Anderson, J., concurring specially).

Research References

West's Key Number Digest
Eminent Domain ⚷106

CIVJIG 52.50

DAMAGES FOR TAKING ACCESS RIGHTS

Access damages

To find just compensation to an owner whose access rights are taken, calculate the difference between:

1. The fair market value of the entire property immediately before the access rights were taken, and

2. The fair market value of what is left after the access rights were taken.

The result is the just compensation for the loss of access rights as well as for severance damages to the part of the property that is left.

[Give CIVJIG 52.40 if not previously given.]

USE NOTE

The court should give CIVJIG 52.40 if it has not been previously given.

AUTHORITIES

The measure of damages a property owner is entitled to recover where his right of access has been damaged or taken is the difference between the market value of the owner's property before and after suitable access has been denied. Only diminution in value of the real estate is relevant. *See State by Humphrey v. Strom*, 493 N.W.2d 554, 559 (Minn. 1992); *State by Mondale v. Gannons Inc.*, 275 Minn. 14, 21, 145 N.W.2d 321, 327 (1966); *Hendrickson v. State*, 267 Minn. 436, 446, 127 N.W.2d 165, 173 (1964).

Research References

West's Key Number Digest
Eminent Domain ⚿138

CIVJIG 52.55

SEVERANCE DAMAGES—DEFINITION

Definition of "severance damages"

Where only a part of the property is taken, there may be damages to the property that is left.

These damages are called "severance damages."

AUTHORITIES

A physical taking of a tract of land may inflict damages upon land of an owner that is not taken. Such damages are generally referred to as consequential (severance) damages, and are expressly required to be compensated for under the Constitution. *See Victor Co. v. State*, 290 Minn. 40, 44, 186 N.W.2d 168, 171 (1971); Minn. Const. Art. 1, § 13.

M.S.A. § 117.085 requires that property owners be awarded damages that result from the taking. Thus, where only part of a tract of land is taken, the landowner is entitled to damages for loss to the part remaining, as well as to the part actually taken. *See Alexandria Lake Area Serv. Region v. Johnson*, 295 N.W.2d 588, 590 (Minn. 1980). Damages to the portion of the tract not taken, or "remainder," may encompass restriction of access, air, view, light, or other property interests. *See County of Anoka v. Blaine Bldg. Corp.*, 566 N.W.2d 331, 334 (Minn. 1997). *See also State by Humphrey v. Strom [the "Woodbridge case"]*, 493 N.W.2d 554, 559 (Minn. 1992); *State by Mondale v. Gannons Inc.*, 275 Minn. 14, 21, 145 N.W.2d 321, 327 (1966); *Hendrickson v. State*, 267 Minn. 436, 446, 127 N.W.2d 165, 173 (1964).

Research References

West's Key Number Digest
Eminent Domain 🔑95, 136, 222(5)

CIVJIG 52.60

SEVERANCE DAMAGES TO NONCONTIGUOUS PROPERTY—DEFINITION

Damages for properties not joined

An owner may have several properties that are not joined, but are put to a use that involves all the properties. In this situation, taking all or part of one property may damage the properties that are left.

When that happens, the owner is entitled to damages for the reduction in value of the properties that are left. These are called "severance damages."

USE NOTE

A claim for severance damages to a noncontiguous tract can only be established upon proof that "the use to which the tracts are applied is so connected, that the taking from one in fact damages the other." *City of Minneapolis v. Yale*, 269 N.W.2d 754, 756–57 (Minn. 1978); M.S.A. § 117.086. This definition applies to noncontiguous tracts only. CIVJIG 52.55 should be given for a partial taking.

AUTHORITIES

In *City of Minneapolis v. Yale*, 269 N.W.2d 754, 756–57 (Minn. 1978), the court held that the proper standard to be applied to noncontiguous tracts is M.S.A. § 117.086, that is, whether "the use to which the tracts are applied is so connected, that the taking from one in fact damages the other." Though not subsequently cited, it is reasonable to conclude that *Yale* is still current law, in light of similar holdings in other jurisdictions. In most states, the issue of "whether the use of the tracts is so connected that a taking from one damages the other" is a question of fact for the jury or designated trier of fact. 4A Nichols, The Law of Eminent Domain § 14B.04 (3d ed. 1997).

Research References

West's Key Number Digest
Eminent Domain ⚷137, 138, 222(5)

CIVJIG 52.65

PARTIAL TAKING—DAMAGES FOR PART TAKEN AND SEVERANCE DAMAGES

Just compensation for partial taking

To find just compensation to an owner when part of his or her property is taken, calculate the difference between:

1. The fair market value of the entire property immediately before the part was taken, and

2. The fair market value of what is left afterwards.

The result is the just compensation for the part taken as well as for severance damages for the part that is left.

[CIVJIG 52.70 should be given at this point.]

USE NOTE

The court should give CIVJIG 52.40 if it has not previously been given.

This instruction may also be modified to be given in connection with the taking of easements.

AUTHORITIES

The central question in condemnation proceedings is the difference in market value before and after the taking. *See State by Lord v. Pearson*, 260 Minn. 477, 110 N.W.2d 206 (1961). When part of a tract of land is taken, the owner is entitled to the difference between the market value of the land before the taking and the market value of what is left after the taking, excluding from consideration general benefits, and deducting from the difference special benefits. *See State by Lord v. Hayden Miller Co.*, 263 Minn. 29, 32, 116 N.W.2d 535, 537–538 (1962); *State by Lord v. Pahl*, 254 Minn. 349, 356, 95 N.W.2d 85, 90 (1959). The "before and after" rule accurately reflects the measure of damages for a partial taking. *State by Humphrey v. Strom [the "Woodbridge case"]*, 493 N.W.2d 554, 559 (Minn. 1992). *See also County of Anoka v. Blaine Bldg. Corp.*, 566 N.W.2d 331, 334 (Minn. 1997); *State v. North Star Concrete Co.*, 265 Minn. 483, 122 N.W.2d 118 (1963).

Research References

West's Key Number Digest
Eminent Domain ⚷138, 141(1), 222(5)

CIVJIG 52.70

PARTIAL TAKING—SEPARATE VERDICTS

Part of property taken—separate verdicts

> You must separately decide the damages for the property taken and the severance damages for the property that is left.

USE NOTE

This instruction must be given upon request of any party. *See* M.S.A. § 117.175.

AUTHORITIES

Upon request of a party to an appeal from the award of the commissioners, the jury or court shall show in the verdict or order the amount of the award of damages to reimburse the owner for the land taken, and the amount of the award of damages, if any, to reimburse the owner for damages to the remainder tract not taken. *See* M.S.A. § 117.175.

Research References

West's Key Number Digest
Eminent Domain ⚷222(5), 223

CIVJIG 52.75

LEASEHOLDS

Definition of "leasehold interest"

In this case, (name of party) was a tenant on the property taken. The interest that a tenant has in a property is called a "leasehold."

Calculating compensation for property owner and tenant

Where there is a leasehold interest in the property taken, you must decide just compensation separately for the property owner and the tenant.

List the two amounts separately on the verdict form.

Follow these steps:

1. Determine just compensation for the entire property taken.
2. Determine the value of the tenant's interest. This is the value of the leasehold as of (date of the taking).
3. Determine just compensation to the property owner, which is the difference between:
    a. The value of the entire property, and
    b. The value of the tenant's interest.

USE NOTE

A separate statement of the award to the lessor and the lessee is provided for in M.S.A. § 117.175.

AUTHORITIES

The amounts awarded to each person possessing an interest in the subject property are to be shown separately in the verdict. M.S.A.

§ 117.175. The measure of damages for the condemnation of a leasehold is the fair market value of the leasehold based on the difference between the fair rental value of the premises and the rent owing during the remainder of the term. *See State v. Belmont, Holmberg*, 384 N.W.2d 214, 216 (Minn. Ct. App. 1986).

The gross damages to be awarded shall first be determined, and then the award is to be apportioned among those persons having an interest in the property. *See State by Youngquist v. Anderson*, 176 Minn. 525, 223 N.W. 923 (1929). The value to be determined, or gross award, is that of the property as a whole, and not the sum of values of the separate items composing the entire estate. *See State v. Robinson*, 266 Minn. 166, 178, 123 N.W.2d 812, 821 (1963); *Minneapolis-St. Paul Metropolitan Airports Comm'n, v. Hedberg-Freidheim Co.*, 226 Minn. 282, 286, 32 N.W.2d 569, 572 (1948). The measure of damages upon condemnation of a leasehold is the fair market value of that leasehold. *See State v. Robinson*, 266 Minn. at 175, 123 N.W.2d at 819 (1963).

Research References

West's Key Number Digest
Eminent Domain ⚷147

CIVJIG 52.80

BENEFITS OF A DITCH TO ADJOINING LANDOWNERS

How costs and benefits are decided

Assessing the cost of a ditch improvement is determined by the benefits to the surrounding property owners.

The benefits are used to assess the cost of the ditch improvement among those property owners.

Appointment of viewers

Three viewers were appointed by the (County Board) (Ditch Authority) to calculate the benefits of the ditch to each adjacent piece of property.

The viewers are independent and do not represent the county or any landowner or petitioner.

Right to appeal to a jury

The parties have the right to appeal the viewers' decision to a jury if either party is dissatisfied.

You will then decide the amount of benefit of the ditch in improving the property.

Deciding a just amount

The viewers' decision is one item of evidence you may consider in deciding a just amount.

Consider and weigh it together with all of the other evidence.

You are not bound by the viewers' decision. It does not limit you to maximum or minimum amounts.

Decide the benefits as of the time the viewers first viewed the property.

Determine a dollar amount that fairly and accurately represents the actual benefit the ditch improvement made to the property.

[I will then apply the proper percentage to determine the actual assessment.]

USE NOTE

If there is a taking issue, the court should give CIVJIG 52.10, the basic condemnation instruction.

AUTHORITIES

The Drainage Code, M.S.A. ch. 103E, establishes procedures for dealing with the initial construction, improvements, and repairs of ditches. Each proceeding has its own statutory requirements for obtaining jurisdiction, and one proceeding may not be offered under a petition for another type of task. *See Oelke v. County of Faribault*, 244 Minn. 543, 552, 70 N.W.2d 853, 860 (1955). Because the present statute limits "repairs" to the extent of original construction, work calling for digging ditches deeper than originally constructed, even if doing so brings the ditch up to the specifications of the original plan, is considered an improvement. *See Petition of Zimmer*, 359 N.W.2d 266, 267 (Minn. 1984); *In re Judicial Ditch No. 17*, 263 Minn. 547, 549, 117 N.W.2d 392, 394 (1962) (any new ditch that follows the course of any other older ditch will be an improvement of the older ditch as a physical fact, because the new ditch will have to be wider and deeper in order to provide better drainage).

The procedure for improving an established ditch is initiated by a petition filed with the auditor. M.S.A. § 103E.215. The petition must represent not less than 26% of the resident property owners affected by the improvement, or not less than 26% of the area of property affected by the improvement. M.S.A. § 103E.215, subd. 4. Petitioners must file a bond payable to the county in case the proceedings are dismissed or a contract is not awarded to construct the drainage system proposed in the petition. M.S.A. § 103E.202, subd. 5. Costs and benefits are determined through a process of a preliminary survey and hearing, detailed survey and hearing, detailed survey, appointment of viewers, and final hearing. *See* M.S.A. §§ 103E.241, 103E.261, 103E.245.

Reconsideration of specific assessments for benefits and awards for damages by a jury must be initially undertaken pursuant to M.S.A. § 103E.091; without this procedure, an appeal to the Supreme Court cannot be made "merely on the basis of asserted error in assessments and awards." *In re Petition of Black v. Northwestern Nat'l Bank of Minneapolis*, 283 Minn. 86, 88, 167 N.W.2d 147, 149 (1969); *see also In Re County Ditch No. 21 of Redwood County*, 262 Minn. 210, 215, 114

N.W.2d 572, 576 (1962); *Oelke v. Faribault County*, 260 Minn. 361, 367, 110 N.W.2d 145, 149 (1961). When there is an appeal from an order of the board relating to benefits and damages, the amount determined by the jury "stands for and in the place of the amount from which the appeal was taken." *Hagen v. Martin County*, 253 Minn. 367, 371, 91 N.W.2d 657, 660 (1958); *see also In re Petition of Black v. Northwestern Nat'l Bank of Minneapolis*, 283 Minn. 86, 88, 167 N.W.2d 147, 150 (1969). Where estimated benefits are less than estimated damages plus cost of construction, an order establishing ditch improvement may be nullified, and the county board may be without authority to take further steps in the proceedings. *See Hagen*, 253 Minn. at 371, 91 N.W.2d at 657. Benefits and damages arising from the improvement are established at the time improvement is made, not at the time of trial. *Matter of Branch A-38 Joint Ditch No. 204*, 406 N.W.2d 524 (Minn. 1987).

Research References

West's Key Number Digest
Eminent Domain ⚷66 to 91

SPECIAL VERDICT FORMS

CIVSVF 52.90

SEVERANCE DAMAGES

1. What amount of money is the just compensation for (property owner), as of (date of taking)?

$______

[The amounts you insert for Questions 2 and 3—when added together—must equal the amount you inserted for Question 1.]

2. What part of the amount of money inserted as your answer to Question 1 is for the property actually taken?

$______

3. What part of the amount of money inserted as your answer to Question 1 is for severance damages to the remaining property that is left?

$______

USE NOTE

In Question 3, the phrase "that is left" was substituted for the phrase "not taken," reflecting the Committee's decision to use the term "that is left" instead of "not taken" in both the verdict form and comparable instructions.

The questions in this special verdict form correspond with the following jury instructions:

1. CIVJIG 52.35: Just Compensation—Definition.
2. CIVJIG 52.65: Partial Taking—Damages for Part Taken and Severance Damages.
3. CIVJIG 52.55: Severance Damages—Definition.

CIVSVF 52.91

NON-CONTIGUOUS TRACTS

1. Was the use to which all of (property owner)'s tracts were applied on (date of taking) so interconnected that the taking of Tract A damaged the other non-contiguous tracts—Tracts B and C—that are left?

____
Yes or No

[If your answer to Question 1 was "Yes," then answer Questions 2, 3, and 4. If your answer to Question 1 was "No," then skip to Question 5.]

2. What amount of money will fairly compensate (property owner)?

$________

3. What part of the amount of money inserted in your answer to Question 2 is for the property actually taken—Tract A?

$________

4. What part of the amount of money inserted in your answer to Question 2 is for the damage to the property that is left—Tracts B and C?

$________

[Answer Question 5 only if your answer to Question 1 was "No."]

5. What amount of money will fairly compensate (property owner) for the taking of Tract A?

$________

USE NOTE

This special verdict form posits a landowner owning three non-contiguous tracts of property: Tract A, Tract B, and Tract C. For simplicity's sake, the form assumes that all of Tract A has been taken.

Although the Committee has decided in favor of a uniform and consistent use of the word "property" in the condemnation instructions and special verdict forms, the word "tract" has been retained in CIVSVF 52.91 because that word (or its synonym "parcel") is likely to be used by the parties themselves in this condemnation scenario involving non-contiguous tracts of property.

The questions in this form correspond with the following jury instructions:

1. CIVJIG 52.60: Severance Damages to Noncontiguous Property—Definition.
2. CIVJIG 52.30: Just Compensation—Definition.
3. CIVJIG 52.60: Severance Damages to Noncontiguous Property—Definition.
4. CIVJIG 52.60: Severance Damages to Noncontiguous Property—Definition.
5. CIVJIG 52.60: Severance Damages to Noncontiguous Property—Definition.

CIVSVF 52.92

OWNER AND TENANT

1. What is the just compensation for the property taken as of (date of taking)?

$________

[The amounts you insert for Questions 2 and 3—when added together—must equal the amount you inserted for Question 1.]

2. What is the fair market value of (tenant)'s leasehold interest, as of (date of taking)?

$________

3. What is the just compensation for (property owner), as of (date of taking)?

$________

USE NOTE

The questions in this special verdict form correspond with the following jury instructions:

1. CIVJIG 52.35: Just Compensation—Definition.
2. CIVJIG 52.75: Leaseholds.
3. CIVJIG 52.75: Leaseholds.

CATEGORY 55

EMPLOYER AND EMPLOYEE

Table of Instructions

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SPECIAL VERDICT FORMS

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CIVSVF 55.91 Negligent Hiring, Retention, or Supervision
CIVSVF 55.92 Employer or Co-Employee Liability—Conscious and Deliberate Intent to Cause Injury
CIVSVF 55.93 Assault Exception
CIVSVF 55.94 Whistleblower

INTRODUCTORY NOTE

An employer is subject to liability pursuant to a variety of tort and contract claims, whether by employees or third parties. This section sets out jury instructions and special verdict forms that cover both areas.

USE NOTE

Liability for Torts

An employer may be liable for its employees' torts, either vicariously or directly. Direct liability may be found where the employer negligently hired (CIVJIG 55.20), supervised (CIVJIG 55.25) or retained (CIVJIG 55.30) an employee who threatened or caused physical injury to another person. An employer may be vicariously liable for the negligence of an employee (CIVJIG 30.15) and for an employee's intentional torts (CIVJIG 30.20). Since employers are only liable for the actions of employees, the definitions of "employee" and "independent contractor" in CIVJIG 30.10 are important in cases where the tortfeasor's relationship with the employer is at issue.

An employer may also be liable for defamation. Employers are generally exposed to defamation issues in the context of providing references for former employees, or compelled self-publication by the former employee to a prospective employer. The definition of defamation is found in CIVJIG 50.10. CIVJIG 50.15 provides the definitions of the different methods by which a defamatory statement may be published. The typical defense to a defamation claim is that the statement was true. The definitions of "true" and "false" are given in CIVJIG 50.25. CIVJIGs 50.55 and 50.60 set forth the actual and special damages recoverable for defamation. In defamation cases arising in the employment context, qualified privilege issues (CIVJIG 50.30) are also frequently raised. Privacy claims (Category 72), particularly claims for intrusion on seclusion (CIVJIG 72.10) and public disclosure of private facts (CIVJIG 72.20), may also be asserted against employers.

Discrimination Claims

The jury instruction guide does not provide jury instructions with regard to discrimination or sexual harassment claims. As this edition was going to print, however, the legislature amended M.S.A. § 363A.33 (2014) to provide for a right to a jury trial under the Minnesota Human Rights Act. For additional instructions concerning employment litigation, *see* 8th Cir. Civil Jury Instr. 4.50A (2013), 5.01ff. available at http://juryinstructions.ca8.uscourts.gov/civil_instructions.htm.

Employment Contracts

Although there is no jury instruction for it, the general rule governing employment is the “at-will” rule, which states that either the employer or the employee may terminate the employment at any time, for good cause or no cause. Employers and employees are free to alter the terms and conditions of the employment relationship, including the terms for ending the relationship, pursuant to a contract. The formation of contracts is covered by CIVJIGs 20.10 through 20.40. These instructions provide for the elements of a contract (CIVJIG 20.10), offer (CIVJIG 20.15), acceptance (CIVJIG 20.20), counteroffer (CIVJIG 20.25), rejection (CIVJIG 20.30), revocation (CIVJIG 20.35) and consideration (CIVJIG 20.40).

Employment handbooks or manuals are sometimes considered employment contracts. CIVJIG 55.35 may be used for those instances where the jury must consider the effect of provisions within the handbooks or manuals. The jury instruction guide does not recommend any instruction for acceptance or consideration with regard to employment contracts specifically, but rather advises that the special verdict form be worded to incorporate the issues of acceptance and consideration as they pertain to the formation of an employment contract (CIVJIGs 55.40 and 55.45). As with all contracts, the employer and employee have a duty of good faith and fair dealing with regard to the employment contract, which is stated in CIVJIG 20.55.

While there are numerous issues that arise when an employee is terminated, the jury instruction guide has only one pattern instruction pertaining to discharge. CIVJIG 55.65 is used in cases where there is an issue as to whether the termination violated public policy.

Instructions on what constitutes a breach of contract are provided in CIVJIG 20.45, and would be generally applicable to employment contracts. The damages recoverable by the non-breaching party are described in CIVJIG 20.60. CIVJIG 20.65 describes the non-breaching party’s obligation to mitigate damages.

PART A

EMPLOYMENT-RELATED TORT CLAIMS

INTRODUCTORY NOTE

An employer is subject to vicarious liability for the actions of its employees. *See* Category 30 (Vicarious Liability and Imputed Fault). Vicarious liability aside, an employer may also be held directly liable for negligent hiring, retention, or supervision of an employee who causes injury to another employee or to a third person.

An employer covered by the Workers' Compensation Act is ordinarily not liable for personal injury to its employees, whose exclusive remedy is provided by the Act. M.S.A. § 176.031 (employer's obligation to pay compensation under the Act "is exclusive and in place of any other liability"). An employer is subject to liability, however, to claims by employees who are not covered by the Act or who sustain injuries that are not covered by the act. If the employee or employee's injuries are not covered by the Act, the employee may be able to recover against the employer, if the employer's tort liability is established. In those cases, the employer's nondelegable duty to use reasonable care to provide a safe place of work for its employees becomes relevant. An employer has a nondelegable duty to use reasonable care to provide a safe place to work for its employees. That standard of care also becomes relevant in cases where the Workers' Compensation Act is inapplicable, in cases involving the liability of employers of independent contractors, or in cases involving third party claims arising out of injury to an employee, as in products liability cases where the product manufacturer seeks contribution from the injured employee's employer.

The primary exceptions to the exclusive remedy provision are for cases where the employer deliberately intends to injure an employee, or where the employee is injured by the assault of a third person unconnected to the employee's employment or status as an employee. In addition, the Workers' Compensation Act does not bar a claim by an injured employee against a co-employee who injured the employee through gross negligence or who intended to injure the employee. M.S.A. § 176.061, subd. 5(c).

Negligent Hiring, Retention, and Supervision

Employer liability may be based on theories of negligent hiring, retention, or supervision. Liability for negligent hiring is based on the employer's negligence "in placing a person with known propensities, or propensities which should have been discovered by reasonable investigation, in an employment position in which because of the circumstances of the employment, it should have been foreseeable that the hired individual posed a threat of injury to others." *Ponticas v. K.M.S. Investments*, 331 N.W.2d 907, 911 (Minn. 1983).

An employer's liability for retaining an employee with a propensity to cause harm to others is based on the employer's "personal fault in exposing others to unreasonable risk of injury in violation of the master's duty to exercise due care for their protection." *Porter v. Grennan Bakeries*, 219 Minn. 14, 22, 16 N.W.2d 906, 910 (1944). In general, an employer has a duty to "refrain from retaining employees with known dangerous proclivities." *J.M. v. Minnesota Dist. Council of Assemblies of God*, 658 N.W.2d 589, 597 (Minn. Ct. App. 2003); *Olson v. First Church of Nazarene*, 661 N.W.2d 254, 264 (Minn. Ct. App. 2003), *citing Yunker v. Honeywell, Inc.*, 496 N.W.2d 419, 423 (Minn. Ct. App. 1993), rev. denied (Minn. Apr. 20, 1993).

Negligent supervision arises when the employer negligently fails to supervise an employee and the activity in which the employee was involved created a threat of harm to the employee or to third persons. *Semrad v. Edina Realty, Inc.*, 493 N.W.2d 528, 533–534 (Minn. 1992).

In *Johnson v. Peterson*, 734 N.W.2d 275, 277 (Minn. Ct. App. 2007), the court of appeals held that Minnesota law does not recognize a cause of action for the negligent training of an employee. In *M.L. v. Magnuson*, 531 N.W.2d 849, 856 (Minn. Ct. App. 1995), the court of appeals identified negligent hiring, retention, and supervision as the available causes of action where suit is brought against an employer in negligence for injuries caused by one of its employees. In *Johnson*, the court of appeals concluded that the negligent training claim failed because it was not listed as an available claim in *M.L. v. Magnuson*. *Johnson*, 734 N.W.2d at 277.

Third Party Claims and Claims where the Workers' Compensation Act Does Not Apply

Even if the employee's exclusive remedy is provided by the Workers' Compensation Act, the Act does not preclude the assertion of contribution claims by third parties who bring contribution claims against the employer, *Lambertson v. Cincinnati Corp.*, 312 Minn. 114, 127–30, 257 N.W.2d 679, 688–89 (1977). In those cases, the employer's duty to use reasonable care to provide its employees with a safe place to work becomes relevant.

If the Workers' Compensation Act is inapplicable, the employee's common law and statutory remedies remain intact. *Foley v. Western Alloyed Steel Casting Co.*, 219 Minn. 571, 574, 18 N.W.2d 541, 543 (1945), *citing Donnelly v. Minneapolis Mfg. Co.*, 161 Minn. 240, 245, 201 N.W. 305, 307 (1924). The Act does not bar tort recovery in cases where an employee is not a person covered by the Act, *see, e.g., Stelling v. Hanson Silo Co.*, 563 N.W.2d 286 (Minn. Ct. App. 1997) (minor son of an executive officer of a family farm corporation excluded by M.S.A. § 176.041, subd. 1(b)); *Stenvik v. Constant*, 502 N.W.2d 416 (Minn. Ct. App. 1993), rev. denied (Minn. Aug. 24, 1993), or where an employee's injuries are not covered by the Act, as in the case of certain mental or emotional harm.

Cases involving mental problems are classified into three categories. The first includes cases in which mental stimulus causes physical injury. The second includes cases where physical injury produces mental injury. The third includes cases where the mental stimulus produces mental injury. The first two types of claims are compensable, but the third is generally not. *Johnson v. Paul's Auto & Truck Sales, Inc.*, 409 N.W.2d 506, 508 (Minn. 1987); *see also Castner v. MCI Telecommunications Corp.*, 415 N.W.2d 873, 873 (Minn. 1987) ("[i]n Minnesota, mental injuries caused by or aggravated by work-related physical injuries are compensable whereas mental injuries produced by work-related mental stress are not"); *Lockwood v. Independent School Dist. No. 877*, 312 N.W.2d 924, 926 (Minn. 1981) (no workers' compensation coverage for mental disability caused by work-related stress without physical trauma). In *Schuette v. City of Hutchinson*, 843 N.W.2d 233 (Minn. 2014), the supreme court declined to overrule *Lockwood*, holding that *Lockwood's* distinction between mental and physical injuries was not arbitrary and effectuated the purpose of the compensation act. For injuries after October 2013, however, work-related post-traumatic stress disorder is compensable, unless it is the product of termination, workplace discipline, job transfer, promotion or demotion, or similar action taken in good faith by the employer. *See* M.S.A. § 176.011, subds. 15(d) and 16.

An employer has a nondelegable duty to use ordinary care to provide a reasonably safe place to work for its employees. *Berg v. Johnson*, 252 Minn. 397, 401, 90 N.W.2d 918, 921(1958) ("[t]he duty of a master to warn and instruct his employees of the dangers and risks involved in his employment is absolute and nondelegable"); *Baumgartner v. Holslin*, 236 Minn. 325, 327, 52 N.W.2d 763, 765 (1952) (employer has duty to exercise reasonable care in providing employee with reasonably safe place in which to work); *Novotny v. Bouley*, 223 Minn. 592, 598, 27 N.W.2d 813, 817 (Minn. 1947) ("[o]ne of the absolute nondelegable duties of the master is to provide a safe place to work"); *Jenkins v. Jenkins*, 220 Minn. 216, 221, 19 N.W.2d 389, 392 (1945) ("absolute and nondelegable duty" to exercise reasonable care for safety of servants, including warning immature and inexperienced employees of nonobvious dangers incident to their work); *Yates v. Hanna Mining Co.*, 365 N.W.2d 783, 787 (Minn. Ct. App. 1985), rev. denied (Minn. June 24, 1985) ("[t]he law in this state is unwavering: an employer owes his employees a nondelegable duty to furnish a safe place to work").

An employer of an independent contractor may also be liable to employees of the independent contractor. The nature of that liability may depend on whether the employer retains control or some measure of control over the project. Even if not, the employer may owe a duty of care as a possessor of land. *Conover v. Northern States Power Co.*, 313 N.W.2d 397, 401 (Minn. 1981).

The level of control retained by the employer must be significant. *Presbrey v. James*, 781 N.W.2d 13, 17 (Minn. Ct. App. 2010). The company has to retain control over the "operative detail of the work." *Sutherland v. Barton*, 570 N.W.2d 1, 5 (Minn. 1997).

In *Presbrey*, the court of appeals determined that the retained control concept was inapplicable in a case involving a homeowner's relationship with an independent contractor who was hired to replace decks on the defendant's house. He died in an accident while working on the house. The record did not establish that the defendant retained control of the project; the decedent in the case provided his own equipment and had expertise in construction. The homeowner did not. The court of appeals held that the record was inadequate to establish the detailed control necessary under the *Sutherland*.

The court also noted the admonition in *Conover v. Northern States Power Co.*, 313 N.W.2d 397, 405 (Minn. 1981), that an employer-landowner owes no duty "to inspect or to warn of a defect or danger the employee was engaged to correct." The decedent was a specialist hired to perform the work on the defendant's house and his death resulted from hazards associated with that work. The court of appeals concluded that *Conover* and *Sutherland* precluded liability under the circumstances. *Presbrey*, 781 N.W.2d at 18.

Intentional Injury Exception

The Workers' Compensation Act does not apply where the employer had a conscious and deliberate intent to injure the employee. *Meintsma v. Loram Maintenance of Way, Inc.*, 684 N.W.2d 434, 440 (Minn. 2004); *Gunderson v. Harrington*, 632 N.W.2d 695, 703 (Minn. 2001); *Hildebrandt v. Whirlpool Corp.*, 364 N.W.2d 394, 396–97 (Minn. 1985); *Breimhorst v. Beckman*, 227 Minn. 409, 426, 35 N.W.2d 719, 730 (1949). The intent element is not satisfied by a showing that the employer knew to a substantial certainty that an injury would occur. *Hildebrandt*, 364 N.W.2d at 396–97.

Assault Exception

The Workers' Compensation Act applies to "personal injuries," defined to exclude "an injury caused by the act of a third person or fellow employee intended to injure the employee because of personal reasons, and not directed against the employee as an employee, or because of the employment." M.S.A. § 176.011, subd. 16. If the assault exception applies, the plaintiff still has to establish the employer's fault in order to be entitled to recover.

The supreme court has noted that there are three categories of cases in which assault exception cases fall:

> (1) those that are noncompensable under the Act because the assailant was motivated by personal animosity toward his victim, arising from circumstances wholly unconnected with the employ-

> ment; (2) those that are compensable under the Act because the provocation or motivation for the assault arises solely out of the activity of the victim as an employee; and (3) those that are compensable under the Act because they are neither directed against the victim as an employee nor for reasons personal to the employee.

Meintsma v. Loram Maintenance of Way, Inc., 684 N.W.2d 434, 439 (Minn. 2004), *citing McGowan v. Our Savior's Lutheran Church*, 527 N.W.2d 830, 834 (Minn. 1995).

The supreme court has narrowly construed the assault exception. *Meintsma v. Loram Maintenance of Way, Inc.*, 684 N.W.2d 434, 439 (Minn. 2004); *Foley v. Honeywell, Inc.*, 488 N.W.2d 268, 273 (Minn. 1992); *Bear v. Honeywell, Inc.*, 468 N.W.2d 546, 547–48 (Minn. 1991). The exception does not apply if the plaintiff's employment was a "causal factor contributing" to the assault. *Meintsma*, 684 N.W.2d at 439.

Co-employee Liability

The Workers' Compensation Act is not the exclusive remedy for an injured employee in cases where "the injury resulted from the gross negligence of the co-employee or was intentionally inflicted by the co-employee." M.S.A. § 176.061, subd. 5(c). In *Meintsma v. Loram Maintenance of Way, Inc.*, 684 N.W.2d 434, 441 (Minn. 2004), the supreme court held that the intentional injury exception requires proof that the defendant consciously and deliberately intended to cause the injury. Intent to do the act is insufficient.

An employee may also be held liable for "gross negligence" in causing injury to another co-employee. The injured employee must prove gross negligence by the co-employee and that the co-employee owed a personal duty to the employee, that the breach of the duty caused the employee's injury, and that the activity that caused the injury was not part of the general administrative duties of the co-employee. *Wicken v. Morris*, 527 N.W.2d 95, 98 (Minn. 1995). "Coemployee" includes a "corporate officer, general supervisor, or foreman." *Dawley v. Thisius*, 304 Minn. 453, 455, 231 N.W.2d 555, 557 (1975). As a matter of policy, the court has noted that there is no justification for distinguishing among employees based on their status. *Stringer v. Minnesota Vikings Football Club, LLC*, 705 N.W.2d 746, 757–58 (Minn. 2005). The court in *Wicken* explained "personal duty":

> [P]ersonal duty to co-employees . . . is no different than the duty any individual owes another arising from normal daily social contact—the duty to refrain from conduct that might reasonably be foreseen to cause injury to another. *See, e.g., Johnson v. Ramsey County*, 424 N.W.2d 800 (Minn. Ct. App. 1988) (personal duty not to batter employees), pet. for rev. denied (Minn. Aug. 24, 1988); *Parker v. Tharp*, 409 N.W.2d 915 (Minn. Ct. App. 1987) (personal duty not to assault co-employee).

In *Stringer v. Minnesota Vikings Football Club, LLC*, 705 N.W.2d 746 (Minn. 2005), the supreme court said that *Dawley* and *Wicken* "in essence created a two-prong test which must be met before a coemployee has undertaken a personal duty to a coemployee." 705 N.W.2d at 757. For a personal duty to exist, "the coemployee must have (1) taken direct action toward or have directed another to have taken direct action toward the injured employee . . . and (2) acted outside the course and scope of employment." 705 N.W.2d at 757 The course and scope of employment determination has "the same meaning as the course and scope of employment test used to determine whether an employee qualifies for workers' compensation benefits," *Stringer*, 705 N.W.2d at 760 in order to provide for greater uniformity in the application of the Workers' Compensation Act.

The injured employee is not entitled to recover against a third party, including a coemployee, who is engaged in a common enterprise with the employer. *Stringer v. Minnesota Vikings Football Club, LLC*, 705 N.W.2d 746, 759 n.15 (Minn. 2005).

Common Law Claims and the Human Rights Act

In cases involving discrimination or harassment in the employment context, an aggrieved employee may have different paths to pursue. The employee has the option of proceeding with a claim of discrimination or harassment against the employer under the Human Rights Act, M.S.A. § 363A.01, et seq., or the employee may assert common law claims against the employer. The employee may bypass the administrative procedures in the Act and proceed directly to district court. M.S.A. § 363A.33. A 2014 amendment to § 363A.33, subd. 6, provides that "[a] person bringing a civil action seeking redress for an unfair discriminatory practice or a respondent is entitled to a jury trial." S.F. 2322, Ch. 233 (May 13, 2014). The effective date is August 2, 2014.

In some cases, the employee may have claims based on both theories, if the claims are separate. *Rosenbloom v. Flygare*, 501 N.W.2d 597, 599–600 (Minn. 1993); *Wirig v. Kinney Shoe Corp.*, 461 N.W.2d 374, 379 (Minn. 1990). If the claims overlap, the employee will have to elect which claim to pursue.

The Act makes it an unfair labor practice:

> (2) Except when based on a bona fide occupational qualification, it is an unfair employment practice for an employer, because of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, membership or activity in a local commission, disability, sexual orientation, or age to
>
> > (a) refuse to hire or to maintain a system of employment which unreasonably excludes a person seeking employment; or
> >
> > (b) discharge an employee; or

> (c) discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment.

M.S.A. § 363A.08, subd. 2.

The potential common law claims that may parallel harassment or discrimination claims under the Human Rights Act include assault, battery, false imprisonment, the intentional infliction of emotional distress, defamation, or invasion of privacy. Issues arise as to whether both statutory and common law claims may be asserted in the same proceeding, and, if so, how a jury should be instructed in such cases. Some of those issues were resolved in *Wirig v. Kinney Shoe Corp.*, 461 N.W.2d 374 (Minn. 1990).

The Minnesota Supreme Court held that a battery arising out of the same facts that gave rise to a sexual harassment claim was not expressly abrogated by section 363.11 (renumbered as § 363A.04) of the Human Rights Act. That section reads as follows:

> The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof. Nothing contained in this chapter shall be deemed to repeal any of the provisions of the civil rights law or of any other law of this state relating to discrimination because of race, creed, color, religion, sex, age, disability, marital status, status with regard to public assistance or national origin or familial status; but, as to acts declared unfair by sections 363A.01 to 363A.19, and 363A.28, subdivision 10, the procedure herein provided shall, while pending, be exclusive.

While the supreme court held that the Human Rights Act did not abrogate the common law battery claim, even if the claim was sexually motivated, the court also held that there could not be double recovery for the same harm. The court analogized the situation to a products liability case where the plaintiff pursues both a warranty and negligence action. There are two legal remedies for the same wrongful conduct.

The court concluded that because Wirig obtained attorney fees in the amount of $62,800, she had elected to recover under the Human Rights Act, and her election to recover under the Act precluded recovery for additional punitive damages under the battery claim, unless she could show by "clear and convincing evidence" that the damages award in the battery action was "different in kind from the misconduct" that justified the $6,000 punitive damages award for sexual harassment.

Damages awardable under the Human Rights Act include compensatory and punitive damages. Damages may also be awarded for "mental anguish or suffering." M.S.A. § 363A.29, subd. 4(a). Those damages would seem to subsume any compensatory damages that might be awarded for battery, assault, false imprisonment, or the intentional infliction of emotional distress. The rigid standards established by the supreme court in *Hubbard v. United Press International, Inc.*, 330 N.W.2d 428 (Minn. 1983) for intentional infliction of emotional distress claims do not have to be met in order for damages for "mental anguish or suffering" to be awarded under the Human Rights Act. *State v. Mower County Social Services*, 434 N.W.2d 494, 499–500 (Minn. Ct. App. 1989). The lesser standard for the award of damages for mental anguish or suffering will justify an award of damages for emotional harm, even absent proof of the elements of the tort of intentional infliction of emotional distress. In cases involving loss of consortium claims, however, there may be no overlap between the Human Rights Act and common law claims.

Where the employee has both options, the trial court will have to determine whether and how to submit the overlapping but distinct claims under the Human Rights Act and common law claims made by the employee. Jury instructions on the common law claims begin with CIVJIG 60.10.

The Minnesota Human Rights Act is broad, and in general, guidance for instructions and verdict forms may be obtained from the Manual of Model Jury Instructions for the District Courts of the Eighth Circuit (May 2013).

M.S.A. § 363A.08, subd. 2, prohibits certain forms of discrimination in employment:

> Except when based on a bona fide occupational qualification, it is an unfair employment practice for an employer, because of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, familial status, membership or activity in a local commission, disability, sexual orientation, or age to:
>
> (a) refuse to hire or to maintain a system of employment which unreasonably excludes a person seeking employment; or
>
> (b) discharge an employee; or
>
> (c) discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment.

Discrimination includes sexual harassment under the Minnesota Human Rights Act. M.S.A. § 363A.03, subd. 13. Sexual harassment in an employment case "includes unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct or communication of a sexual nature when:"

> (1) submission to that conduct or communication is made a term or condition, either explicitly or implicitly, of obtaining employment . . . ;
>
> (2) submission to or rejection of that conduct or communication by an individual is used as a factor in decisions affecting that individual's employment . . . ; or
>
> (3) that conduct or communication has the purpose or effect of substantially interfering with an individual's employment . . . or creating an intimidating, hostile, or offensive employment . . . environment.

M.S.A. § 363A.03, subd. 43.

Minnesota courts have used the framework from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), to determine whether the Act has been violated. *Benassi v. Back & Neck Pain Clinic, Inc.*, 629 N.W.2d 475, 480 (Minn. Ct. App. 2001). Under that framework, the plaintiff the plaintiff first has to establish a prima facie case of sexual harassment. Second, the burden of production shifts to the defendant to present a legitimate non-discriminatory reason for its actions. Third, the plaintiff has the ultimate burden of persuading the factfinder that defendant's reasons are pretextual. *Giuliani v. Stuart Corp.*, 512 N.W.2d 589, 593 (Minn. Ct. App.1994).

The plaintiff establishes a prima facie case of sexual harassment by showing that she was a member of a protected class, that she was subjected to unwanted sexual harassment, and that submission to that conduct or communication is made a term or condition, explicitly or implicitly, of obtaining employment, that submission to or rejection of that conduct was used as a factor in decisions affecting her employment, or that the conduct or communication had the purpose of substantially interfering with her employment or created an intimidating, hostile, or offensive employment environment.

Specific standards may vary, depending on the claim. For example, a plaintiff making a hostile work environment claim must prove the following:

> (1) she is a member of a protected group; (2) she was subject to unwelcome harassment; (3) the harassment was based on membership in a protected group; (4) the harassment affected a term, condition or privilege of her employment . . . .

Goins v. West Group, 635 N.W.2d 717, 725 (Minn. 2001).

Discriminatory harassment is not actionable unless it is "so severe or pervasive" that it alters the conditions of the plaintiff's employment and creates an abusive working environment. *Goins v. West Group*, 635

N.W.2d at 725, *citing Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986). The environment to which the plaintiff objects has to be "both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim did in fact perceive to be so." *Goins*, 635 N.W.2d at 725, *citing Faragher v. City of Boca Raton*, 524 U.S. 775, 787, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998). Courts look at the totality of the circumstances in determining whether the environment is sufficiently hostile or abusive to support the claim. The relevant factors include " 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.' " *Goins*, 635 N.W.2d at 725, *citing* Faragher, 524 U.S. 727–28 (*quoting Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993)).

In a sexual harassment case based upon hostile environment, there are several questions that would have to be resolved by the jury:

1. Was (plaintiff) subject to unwelcome sexual harassment?

    Yes ____ No ____

2. Was the sexual harassment so severe or pervasive that a reasonable person in (plaintiff's) position would find (plaintiff's) work environment to be (hostile) (abusive)?

    Yes ____ No ____

3. If your answer to Question 1 was "Yes," then answer this question: did the harassment affect a (term) (condition) (privilege) of her employment?

    Yes ____ No ____

CIVJIG 55.20

NEGLIGENT HIRING

Definition of "negligent hiring"

> An employer is negligent in hiring an employee if the employer knew or should have known that the employee posed a threat of physical injury to others.

USE NOTE

This instruction is intended for use in cases involving claims that an employer negligently hired an employee who subsequently caused injuries to another person.

AUTHORITIES

The Minnesota Supreme Court adopted the tort of negligent hiring in *Ponticas v. K.M.S. Investments*, 331 N.W.2d 907 (Minn. 1983), relying Restatement (Second) of Agency § 213 (1958). Section 213 reads as follows:

> A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless:
>
> (b) in the employment of improper persons or instrumentalities in work involving risk of harm to others.

Liability is based on the employer's negligence "in placing a person with known propensities, or propensities which should have been discovered by reasonable investigation, in an employment position in which because of the circumstances of the employment, it should have been foreseeable that the hired individual posed a threat of injury to others." *Ponticas*, 331 N.W.2d at 911. *See also J.M. v. Minnesota Dist. Council of Assemblies of God*, 658 N.W.2d 589, 593–94 (Minn. Ct. App. 2003); *L.M. v. Karlson*, 646 N.W.2d 537, 544 (Minn. Ct. App. 2002).

Negligent hiring imposes direct liability on an employer:

> It should be noted that this is a direct duty running from the employer to those members of the public whom the employer might reasonably anticipate would be placed in a position of risk of injury as the result of the hiring. Thus, it is distinguishable from liability imputed to an employer as a result of the doctrine of respondeat superior.

Ponticas, 331 N.W.2d at 911, n.5.

The court in *Ponticas* said that the particular sort of offense actually committed by the employee need not be foreseen by the employer:

> We have often held that negligence is not to be determined by whether the particular injury was foreseeable . . . The jury, as finder of fact, could have found, as it did, that it was reasonably foreseeable that a person with a history of offenses of violence could commit another violent crime, notwithstanding the history would not have shown him to ever have committed the particular type of offense.

Ponticas, 331 N.W.2d at 912.

The employer's obligation to make an inquiry into a potential employee's background is not subject to any fixed rule:

> [W]e reject the contention that, as a matter of law, there exists a duty upon an employer to make an inquiry as to a prospective employee's criminal record even where it is known that the employee is to regularly deal with members of the public . . . . If the employer has made adequate inquiry or otherwise has a reasonably sufficient basis to conclude the employee is reliable and fit for the job, no affirmative duty rests on him to investigate the possibility that the applicant has a criminal record. There are many persons in Minnesota who have prior criminal records but who are now good citizens and competent and reliable employees. Were we to hold that an employer can never hire a person with a criminal record at the risk of later being held liable for the employee's assault, it would offend our civilized concept that society must make a reasonable effort to rehabilitate those who have erred so they can be assimilated into the community. Moreover, a rule mandating an independent criminal history investigation would counter the many worthwhile efforts of individuals, organizations and employers to aid former offenders to re-establish good citizenship, the sine qua non of which is gainful and productive employment. Liability of an employer is not to be predicated solely on failure to investigate criminal history of an applicant, but rather, in the totality of the circumstances surrounding the hiring, whether the employer exercised reasonable care. This is generally a jury question.

Ponticas, 331 N.W.2d at 913.

The court in *Ponticas* also noted that superseding cause will not apply in negligent hiring cases:

> The inherent nature of a negligent hiring cause of action precludes

> the application of superseding intervening cause. By its definition, the factfinder—the jury—has already determined the injury causing conduct of the employee was foreseeable . . . . Moreover, in negligent hiring cases the alleged intervening cause was created by the original negligence.

Ponticas, 331 N.W.2d at 915–16.

The difference between negligent hiring and negligent retention hinges "on when the employer was on notice that an employee posed a threat and failed to take steps to insure the safety of third parties." *Yunker v. Honeywell, Inc.*, 496 N.W.2d 419, 422 (Minn. Ct. App. 1993), rev. denied (Minn. April 20, 1993).

In *Odenthal v. Minnesota Conference of Seventh Day Adventists*, 649 N.W.2d 426 (Minn. 2002) (*Odenthal I*), the supreme court found that M.S.A. § 148B.68 (1998) set forth neutral principles of conduct for unlicensed mental health practitioners that may be used to establish a claim of negligence. In *J.M. v. Minnesota District Council of the Assemblies of God*, 658 N.W.2d 589 (Minn. Ct. App. 2003), the court of appeals considered M.S.A. § 148A.03(a)(2) (2002), which imposes liability on the employer of a member of the clergy who performs or purports to perform psychotherapy and who sexually exploits a patient if "the employer fails or refuses to make inquiries of an employer or former employer whose name and address have been disclosed to the employer and who employed the psychotherapist as a psychotherapist within the last five years, concerning the occurrence of sexual contacts by the psychotherapist with patients or former patients." In *J.M*, the court stated that "[a] determination of whether the statutorily required inquiries were made of a pastor-candidate's former employers does not involve church doctrine, but a determination of how that information should be used in a hiring decision would force the court into an examination of church doctrine governing who is qualified to be a pastor." 658 N.W.2d at 594. Because the Establishment Clause of the First Amendment precluded this examination, the *J.M.* court lacked subject matter jurisdiction over the plaintiff's hiring-related claims.

In *Johnson v. Peterson*, 734 N.W.2d 275, 277 (Minn. Ct. App. 2007), the plaintiff alleged that Peterson, an insurance agent for Bankers Life and Casualty Company, made false representations to him to induce him to transfer money to her. The plaintiff alleged negligent hiring, supervision, and training theories against Bankers Life. The court of appeals held that negligent hiring and supervision claims are based upon the duty of the employer to control employees and to prevent them from intentionally causing personal injury. The court of appeals held that the plaintiff's claimed economic loss based upon Peterson's false representations to him that caused him to transfer money to her was insufficient to state a claim under either of the two theories. *Id.* at 277–78. The plaintiff also claimed that he suffered heart problems and related anxiety disorders because of the events surrounding the money transfer, but the court of appeals held that the allegations were only of emotional distress, which is not a physical injury. *Id.* at 278.

Research References

West's Key Number Digest
Labor and Employment 🔑3052, 3106

CIVJIG 55.25

NEGLIGENT SUPERVISION

Negligent supervision

An employer is negligent in supervising an employee if:

1. The employer failed to use reasonable care to supervise the activity of the employee, and

2. The activity posed a threat of physical injury to the employee or others.

"Reasonable care" is the care a reasonable person would use in the same or similar circumstances.

USE NOTE

This instruction is intended for use in cases involving claims based on an employer's negligent supervision of an employee. Note that it appears to be an open question under Minnesota law whether the theory applies to actions of an employee that are within the course and scope of the employee's work.

AUTHORITIES

The Minnesota Supreme Court has analyzed negligent supervision claims both under Restatement (Second) of Agency § 213 (1958), and Restatement (Second) of Torts § 317 (1965). *Semrad v. Edina Realty, Inc.*, 493 N.W.2d 528, 533–534 (Minn. 1992).

Restatement (Second) of Agency § 213, reads as follows:

> A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless:
>
> (a) in giving improper or ambiguous orders or in failing to make proper regulations; or
>
> (b) in the employment of improper persons or instrumentalities in work involving risk of harm to others; or
>
> (c) in the supervision of the activity; or
>
> (d) in permitting, or failing to prevent, negligent or other

> tortious conduct by persons, whether or not his servants or agents, upon premises or with instrumentalities under his control.

Restatement (Second) of Torts § 317 (1965), reads as follows:

> A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless:
>
> (a) in giving improper or ambiguous orders or in failing to make proper regulations; or
>
> (b) in the employment of improper persons or instrumentalities in work involving risk of harm to others; or
>
> (c) in the supervision of the activity; or
>
> (d) in permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not his servants or agents, upon premises or with instrumentalities under his control.

The court in *Semrad* read section 317 in the following way:

> [T]he entire thrust of section 317 is directed at an employer's duty to control his or her employee's physical conduct while on the employer's premises or while using the employer's chattels, even when the employee is acting outside the scope of employment, in order to prevent intentional or negligent infliction of personal injury.

A claim for negligent retention or negligent supervision requires that the plaintiff prove a threat of physical injury or actual physical injury. *Doe v. F.P.*, 667 N.W.2d 493, 500 (Minn. Ct. App. 2003) rev. denied (Minn. Oct. 21, 2003); *Bruchas v. Preventive Care, Inc.*, 553 N.W.2d 440, 443 (Minn. Ct. App. 1996). Nothing in Restatement (Second) of Torts § 317 "calls for its application in a case involving economic loss only." *Semrad*, 493 N.W.2d at 534.

The court of appeals has stated that negligent supervision claims require proof that the employee acted in the scope of his or her employment. *Olson v. First Church of Nazarene*, 661 N.W.2d 254, 264 (Minn. Ct. App. 2003), citing *M.L. v. Magnuson*, 531 N.W.2d 849, 858 (Minn. Ct. App. 1995), rev. denied (Minn. July 20, 1995).

The exclusivity provision of the Minnesota Human Rights Act (MHRA), M.S.A. § 363A.04, may, in some circumstances, preempt a claim for negligent supervision. The critical question is whether the duty forming the basis of the negligent supervision claim exists apart from the MHRA. *Sullivan v. Spot Weld, Inc.*, 560 N.W.2d 712, 717

(Minn. Ct. App. 1997), rev. den. (Minn. Apr. 24, 1997). Thus, for example, in *Hoover v. Norwest Private Mortgage Banking*, 605 N.W.2d 757, 767–68 (Minn. Ct. App. 2000), aff'd in part, rev'd in part on other grounds, 632 N.W.2d 534 (Minn. 2001), the court found the MHRA preempted a claim for negligent supervision. The court found that the plaintiff's negligent supervision claim in that case arose from a duty to accommodate a disability. Since this duty did not exist at common law, but was created by the MHRA, the exclusivity provision of the MHRA preempted the claim. *Hoover*, 600 N.W.2d at 768.

In *Odenthal v. Minnesota Conference of Seventh Day Adventists*, 649 N.W.2d 426 (Minn. 2002), (*Odenthal I*) the supreme court found that M.S.A. § 148B.68 (1998) set forth neutral principles of conduct for unlicensed mental health practitioners that may be used to establish a claim of negligence. In that case, the plaintiff brought a claim against a member of the clergy for, among other things, negligent marital counseling. On remand, in *Odenthal v. Minnesota Conference of Seventh Day Adventists*, 657 N.W.2d 569, 576 (Minn. Ct. App. 2003) (*Odenthal II*), the court of appeals examined the plaintiff's claims against the church employing the clergymember for negligent retention and supervision. The court of appeals emphasized that its focus was on negligent supervision not as to the clergymember's "pastoral counseling, which could pose the risk of religious entanglement, but as to the negligent secular counseling claim." *Odenthal II*, 657 N.W.2d at 576. The court ruled that the neutral standard of care for supervising unlicensed mental health practitioners can be used to address this claim against the defendant church. *Odenthal II*, 657 N.W.2d at 576.

In *Olson v. First Church of Nazarene*, 661 N.W.2d 254 (Minn. Ct. App. 2003), the court of appeals held that neither the Establishment Clause of the First Amendment nor the Freedom of Conscience Clause of the Minnesota Constitution, Minn. Const. art. I, § 16, precluded the exercise of jurisdiction to determine the existence of an employment relationship between the Minnesota District Church of the Nazarene and a pastor who allegedly engaged in a sexual relationship with a parishioner during the course of counseling. The existence of the employment relationship was a predicate to any evaluation of claims based on vicarious liability, negligent supervision, and negligent retention. 661 N.W.2d at 261. Examination of the existence of the employment relationship would involve the application of neutral principles of law that would not necessitate any inquiry into church doctrine. 661 N.W.2d at 261. The court also held that neutral principles applied to the claims for negligent retention and supervision did not pose risks of entanglement with religious doctrine nor did it burden the exercise of religion. 661 N.W.2d at 264–65.

Research References

West's Key Number Digest
Labor and Employment ⚿3043, 3106

CIVJIG 55.30

NEGLIGENT RETENTION

Negligent retention

An employer is negligent in retaining an employee if:

1. The employer knew or should have known that the employee posed a threat of physical injury to others, and
2. The employer failed to take reasonable action.

Reasonable action may include investigation, discharge, or reassignment of the employee.

USE NOTE

This instruction is intended for use in cases involving claims that an employer was negligent in retaining an employee. Negligent retention claims typically arise out of action taken by the employee outside the course and scope of employment.

AUTHORITIES

Negligent retention was first recognized in *Dean v. St. Paul Union Depot Co.*, 41 Minn. 360, 360, 43 N.W. 54, 55 (1889). An employer's liability for retaining an employee with a propensity to cause harm to others is based on the employer's "personal fault in exposing others to unreasonable risk of injury in violation of the master's duty to exercise due care for their protection." *Porter v. Grennan Bakeries*, 219 Minn. 14, 22, 16 N.W.2d 906, 910 (1944). In general, an employer has a duty to "refrain from retaining employees with known dangerous proclivities." *J.M. v. Minnesota Dist. Council of Assemblies of God*, 658 N.W.2d 589, 597 (Minn. Ct. App. 2003); *Olson v. First Church of Nazarene*, 661 N.W.2d 254, 264 (Minn. Ct. App. 2003), *citing Yunker v. Honeywell, Inc.*, 496 N.W.2d 419, 423 (Minn. Ct. App. 1993), rev. denied (Minn. Apr. 20, 1993).

Negligent retention claims had their origin in the "common law fellow-servant rule which imposed a duty on employers to select employees who would not endanger fellow employees by their presence on the job." *Ponticas v. K.M.S. Investments, Inc.*, 331 N.W.2d 907, 910 (Minn. 1983).

It is unnecessary in negligent retention claims that the employee was acting in the course and scope of his or her authority in order for the employer to be held liable for the injury caused by the employee to a third person. *Bruchas v. Preventive Care, Inc.*, 553 N.W.2d 440 (Minn. Ct. App. 1996). Negligent retention claims usually arise outside the scope of employment. *Yunker v. Honeywell, Inc.*, 496 N.W.2d 419 (Minn. Ct. App. 1993), rev. denied (Minn. April 20, 1993).

Negligent retention appears to be limited to claims involving the threat of physical injury. *Leidig v. Honeywell, Inc.*, 850 F.Supp. 796 (D.Minn. 1994); *Bruchas*, 553 N.W.2d at 443; Yunker, 496 N.W.2d at 423. In *Cook v. Greyhound Lines, Inc.*, 847 F.Supp. 725, 733 (D.Minn. 1994), the court concluded that liability for negligent retention arises only in cases where the employee acts outside the scope of his or her authority:

> [A]fter an exhaustive search of the case law, in this jurisdiction and elsewhere, we have failed to uncover any decision in which the doctrine of negligent hiring or retention has been applied to conduct which arises within the course and scope of an employment relationship. This lack of precedential authority is not surprising, given the fact that the raison d'être for the negligent hiring and retention doctrines was the unavailability of a recovery for conduct which was unactionable under traditional principles of vicarious liability.

In *Odenthal v. Minnesota Conference of Seventh Day Adventists*, 649 N.W.2d 426 (Minn. 2002), (*Odenthal I*) the supreme court found that M.S.A. § 148B.68 (1998) set forth neutral principles of conduct for unlicensed mental health practitioners that may be used to establish a claim of negligence. In that case, the plaintiff brought a claim against a member of the clergy for, among other things, negligent marital counseling. On remand, in *Odenthal v. Minnesota Conference of Seventh Day Adventists*, 657 N.W.2d 569 (Minn. Ct. App. 2003) (*Odenthal II*), the court of appeals examined the plaintiff's claims against the church employing the clergymember for negligent retention and supervision. The court of appeals emphasized that the question before it related not to the clergymember's duties as a pastor, but whether the defendant church negligently retained the clergymember without further investigation after it became aware or should have been aware of his claimed negligent secular counseling. *Odenthal v. Minnesota Conference of Seventh Day Adventists*, 657 N.W.2d 569, 575 (Minn. Ct. App. 2003) (*Odenthal II*). The court ruled that "[b]y applying the tort standard to these facts, the court may use a neutral standard to resolve the claim; no reference to church doctrine is necessary." 657 N.W.2d at 575.

In *Olson v. First Church of Nazarene*, 661 N.W.2d 254 (Minn. Ct. App. 2003), the court of appeals held that neither the Establishment Clause of the First Amendment nor the Freedom of Conscience Clause of the Minnesota Constitution, Minn. Const. Art. I, § 16, precluded the exercise of jurisdiction to determine the existence of an employment relationship between the Minnesota District Church of the Nazarene and a pastor who allegedly engaged in a sexual relationship with a parishioner during the course of counseling. The existence of the employment relationship was a predicate to any evaluation of claims based on vicarious liability, negligent supervision, and negligent retention. 661 N.W.2d at 261. Examination of the existence of the employment relationship would involve the application of neutral principles of law that would not necessitate any inquiry into church doctrine. 661 N.W.2d at 261. The court also held that neutral principles applied to the claims for negligent retention and supervision did not pose risks of entanglement with religious doctrine nor did it burden the exercise of religion. 661 N.W.2d at 264–65.

Research References

West's Key Number Digest
Labor and Employment ⚷3042, 3106

CIVJIG 55.31

EMPLOYER—DUTY TO USE REASONABLE CARE TO PROVIDE A SAFE PLACE TO WORK

Employer's duty

> An employer has a duty to use reasonable care to provide a safe place to work for its employees.
>
> [An employer cannot transfer its duty to use reasonable care to provide a safe place to work to third parties.]

[Give CIVJIG 25.10]

USE NOTE

This instruction is intended for use in cases in which the employer's fault is in issue, either because the plaintiff's claim against the employer is not preempted by the Workers' Compensation Act or because the employer is subject to liability on a third party's contribution claim. The employer's obligation is to use reasonable care to provide its employees a reasonably safe place to work. The courts typically state that the duty is nondelegable. The bracketed language should be used only in cases where is a question concerning the employer's delegation of the duty to provide a safe place to work to third parties.

AUTHORITIES

An employer has a nondelegable duty to use ordinary care to provide a reasonably safe place to work for its employees. *Berg v. Johnson*, 252 Minn. 397, 401, 90 N.W.2d 918, 921 (1958) ("[t]he duty of a master to warn and instruct his employees of the dangers and risks involved in his employment is absolute and nondelegable"); *Baumgartner v. Holslin*, 236 Minn. 325, 327, 52 N.W.2d 763, 765 (1952) (employer has duty to exercise reasonable care in providing employee with reasonably safe place in which to work); *Novotny v. Bouley*, 223 Minn. 592, 598, 27 N.W.2d 813, 817 (Minn. 1947) ("[o]ne of the absolute nondelegable duties of the master is to provide a safe place to work"); *Jenkins v. Jenkins*, 220 Minn. 216, 221, 19 N.W.2d 389, 392 (1945) ("absolute and nondelegable duty" to exercise reasonable care for safety of servants, including warning immature and inexperienced employees of nonobvious dangers incident to their work); *Yates v. Hanna Mining Co.*, 365 N.W.2d 783, 787 (Minn. Ct. App. 1985), rev. denied (Minn. June 24, 1985) ("[t]he law in this state is unwavering: an employer owes his employees a nondelegable duty to furnish a safe place to work").

Research References

West's Key Number Digest
Labor and Employment ⚷2855, 2897

CIVJIG 55.32

EMPLOYER OR CO-EMPLOYEE LIABILITY—CONSCIOUS AND DELIBERATE INTENT TO CAUSE INJURY

[The Committee recommends no instruction. An appropriate special verdict question should be framed to cover the issue.]

Use the following special verdict question:

Did (employer) (employee) consciously and deliberately intend to injure (plaintiff)?

USE NOTE

In cases in which the issue of whether an employer or co-employee intentionally caused injury to an employee arises, no further instruction is necessary to define the terms "conscious" and "deliberate." Accordingly, the issue should be placed on the special verdict form, with no further definition. In these cases intent does not include "knowledge to a substantial certainty" that an injury will occur. Note that the supreme court has established an exacting standard for liability in requiring a conscious and deliberate intent to injure the employee. *See* CIVJIG 60.10 for a definition of "intent."

AUTHORITIES

The Workers' Compensation Act does not apply where the employer had a conscious and deliberate intent to injure the employee. *Meintsma v. Loram Maintenance of Way, Inc.*, 684 N.W.2d 434, 440 (Minn. 2004); *Gunderson v. Harrington*, 632 N.W.2d 695, 703 (Minn. 2001); *Hildebrandt v. Whirlpool Corp.*, 364 N.W.2d 394, 396–97 (Minn. 1985); *Breimhorst v. Beckman*, 227 Minn. 409, 426, 35 N.W.2d 719, 730 (1949). The intent is not satisfied by a showing that the employer knew to a substantial certainty that an injury would occur. *Hildebrandt*, 364 N.W.2d at 396–97, nor can it be inferred from gross negligence. *Breimhorst*, 227 Minn. at 426, 35 N.W.2d at 730.

The Workers' Compensation Act is not the exclusive remedy for an injured employee in cases where "the injury . . . was intentionally inflicted by the co-employee." M.S.A. § 176.061, subd. 5(c). In *Meintsma v. Loram Maintenance of Way, Inc.*, 684 N.W.2d 434, 441 (Minn. 2004), the supreme court held that the intentional injury requires proof that the defendant consciously and deliberately intended to cause the injury. Intent to do the act is insufficient. Knowledge of a substantial certainty that the injury will occur is also insufficient to meet the standard.

Research References

West's Key Number Digest
Labor and Employment ⚷2935, 2943

CIVJIG 55.33

ASSAULT EXCEPTION

[The Committee recommends no instruction. Appropriate special verdict questions should be framed to cover the issues.]

USE NOTE

The definition of "personal injury" in the Workers' Compensation Act excludes "an injury caused by the act of a third person or fellow employee intended to injure the employee because of personal reasons, and not directed against the employee as an employee, or because of the employment." M.S.A. § 176.011, subd. 16. The standards for resolving the questions that arise under the assault exception can be handled with appropriately framed special verdict questions, including whether the third person intended to injure the plaintiff and if so, whether the assault that resulted in the injury was for personal reasons unrelated to the plaintiff's position as an employee or his or her employment. *See* CIVSVF 55.93. Accordingly, no instruction is recommended for the assault exception.

AUTHORITIES

The Workers' Compensation Act applies to "personal injuries," defined to exclude "an injury caused by the act of a third person or fellow employee intended to injure the employee because of personal reasons, and not directed against the employee as an employee, or because of the employment." M.S.A. § 176.011, subd. 16. If the assault exception applies, the plaintiff still has to establish the employer's fault in order to be entitled to recover.

The supreme court has noted that there are three categories of cases in which assault exception cases fall:

> (1) those that are noncompensable under the Act because the assailant was motivated by personal animosity toward his victim, arising from circumstances wholly unconnected with the employment; (2) those that are compensable under the Act because the provocation or motivation for the assault arises solely out of the activity of the victim as an employee; and (3) those that are compensable under the Act because they are neither directed against the victim as an employee nor for reasons personal to the employee.

Meintsma v. Loram Maintenance of Way, Inc., 684 N.W.2d 434, 439 (Minn. 2004), *citing McGowan v. Our Savior's Lutheran Church*, 527 N.W.2d 830, 834 (Minn. 1995) (rape of church employee arose out of activities related to her employment as director of homeless shelter and therefore not covered under the assault exception).

The supreme court has narrowly construed the assault exception. *Meintsma v. Loram Maintenance of Way, Inc.*, 684 N.W.2d 434, 439 (Minn. 2004); *Foley v. Honeywell, Inc.*, 488 N.W.2d 268, 273 (Minn. 1992); *Bear v. Honeywell, Inc.*, 468 N.W.2d 546, 547–48 (Minn. 1991). The exception does not apply if the plaintiff's employment was a "causal factor contributing" to the assault. *Meintsma*, 684 N.W.2d at 439. In making that determination the court has considered several factors, including whether the assault was committed during working hours, whether it was in the plaintiff's office, whether the plaintiff was performing his or her duties at the time, and whether the person who committed the assault had any meaningful contact with the plaintiff outside the workplace. *McGowan v. Our Savior's Lutheran Church*, 527 N.W.2d 830, 834 (Minn. 1995). If the assailant's motives are unknown, the assault exception does not apply. *Bear*, 468 N.W.2d at 547.

Research References

West's Key Number Digest
Labor and Employment ⚷2936

CIVJIG 55.34

GROSS NEGLIGENCE

Definition of "reasonable care"

Reasonable care is the care a reasonable person would use in the same or similar circumstances.

Definition of "negligence"

Negligence is the failure to use reasonable care.

Ask yourself what a reasonable person would have done in these circumstances.

Negligence occurs when a person:

1. Does something a reasonable person would not do; or
2. Fails to do something a reasonable person would do.

Definition of "gross negligence"

Gross negligence is more than just negligence. It is very great negligence or negligence of a high degree.

USE NOTE

M.S.A. § 176.061, subd. 5 (c) provides that "[a] coemployee working for the same employer is not liable for a personal injury incurred by another employee unless the injury resulted from the gross negligence of the coemployee or was intentionally inflicted by the coemployee."

This instruction should be used in cases where the claimant's theory against the co-employee is gross negligence. It parallels the gross negligence instruction in CIVJIG 25.35. For cases where the issue is whether the co-employee intentionally caused injury to the plaintiff, *see* CIVJIG 55.32.

AUTHORITIES

The Workers' Compensation Act is not the exclusive remedy for an injured employee in cases where an injured worker claims that his or her injury was caused by the gross negligence of a co-employee or was "intentionally inflicted" by the co-employee. M.S.A. 176.061, subd. 5(c). "The term 'coemployee' includes a 'corporate officer, general supervisor, or foreman.' " *Stringer v. Minnesota Vikings Football Club*, 705 N.W.2d 746, 754 (Minn. 2005), *quoting Dawley v. Thisius*, 304 Minn. 453, 455, 231 N.W.2d 555, 557 (1975). An employee may also be held liable for "gross negligence" in causing injury to another co-employee. The injured employee must prove gross negligence by the co-employee and that the co-employee owed a personal duty to the employee, that the breach of the duty caused the employee's injury, and that the activity that caused the injury was not part of the co-employee's general administrative duties. *Stringer v. Minnesota Vikings Football Club*, 705 N.W.2d 746, 754 (Minn. 2005); *Wicken v. Morris*, 527 N.W.2d 95, 98 (Minn. 1995).

The duty issue is a question of law for the court. *Stringer v. Minnesota Vikings Football Club*, 705 N.W.2d 746, 755 (Minn. 2005); *Wong v. American Family Mutual insurance Co.*, 576 N.W.2d 742 745 (Minn. 1998). For a coemployee to owe a personal duty to another employee, "the coemployee must have (1) taken direct action toward or have directed another to have taken direct action toward the injured employee . . . and (2) acted outside the course and scope of employment." *Stringer v. Minnesota Vikings Football Club*, 705 N.W.2d 746, 757 (Minn. 2005) (citations omitted). The term "course and scope of employment" is governed by the same standard used to determine whether an injured employee is covered by the Workers' Compensation Act. 705 N.W.2d at 760.

The majority opinion did not discuss the gross negligence issue, because it found that there was no personal duty owing by co-employees to Stringer. Justice Hanson, in dissent, would have found a personal duty however, and he did reach the gross negligence issue. In his opinion, the "the gross negligence standard for coemployee liability" should be described "in terms of what it is—negligence of a high degree, great negligence, more than ordinary negligence, but less than wanton and wilful conduct—and not in terms of what it is not—the provision of scant care . . . ." 705 N.W.2d at 768 (Hanson, J., dissenting). In other contexts the supreme court has defined gross negligence as "negligence in a very high degree." *High v. Supreme Lodge of the World, Loyal Order of Moose*, 214 Minn. 164, 170, 7 N.W.2d 675, 679 (Minn. 1943).

In cases involving the liability of coemployees, the court of appeals has also defined gross negligence as "negligence of the highest degree." *Ackerman v. American Family Mutual Insurance Co.*, 435 N.W.2d 835, 840 (Minn. Ct. App. 1989); *Terveer v. Norling Bros. Silo Co.*, 365 N.W.2d 279, 281 (Minn. Ct. App. 1985).

Research References

West's Key Number Digest
Labor and Employment ⚷2935, 2943

PART B

CLAIMS ARISING OUT OF THE EMPLOYMENT RELATIONSHIP

INTRODUCTORY NOTE

Contract Claims

The general rule governing employment is the "at-will" rule. Where a hiring is for an indefinite period of time the employment is "at-will." *Pine River State Bank v. Mettille*, 333 N.W.2d 622, 627 (Minn. 1983). In such cases, the employer is entitled to "summarily dismiss the employee for any reason or no reason," and "the employee, on the other hand, is under no obligation to remain on the job." *Pine River State Bank v. Mettille*, 333 N.W.2d 622, 627 (Minn. 1983), *citing Cederstrand v. Lutheran Bhd.*, 263 Minn. 520, 532, 117 N.W.2d 213, 221 (1962). The employment relationship is terminable at the will of either party. *See Lewis v. Equitable Life Assurance Soc.*, 389 N.W.2d 876, 882 (Minn. 1986); *Thomsen v. Independent School Dist. No. 91, Carlton County, Barnum*, 309 Minn. 391, 392, 244 N.W.2d 282, 284 (1976); *Cederstrand v. Lutheran Brotherhood*, 263 Minn. 520, 532, 117 N.W.2d 213, 221 (1962); *Ziegler v. Leo A. Hoffmann Center, Inc.*, 397 N.W.2d 378, 382 (Minn. Ct. App. 1986), review denied, Feb. 13, 1987; *Gates Rubber Co. v. Porwoll*, 395 N.W.2d 92, 96 (Minn. Ct. App. 1986); *Brookshaw v. South St. Paul Feed, Inc.*, 381 N.W.2d 33, 36 (Minn. Ct. App. 1986), rev. denied (Minn. April 11, 1986). The supreme court has not read an implied covenant of good faith into employment contracts. *See Hunt v. IBM Mid America Employees Federal Credit Union*, 384 N.W.2d 853, 858 (Minn. 1986); *Wild v. Rarig*, 302 Minn. 419, 444, 234 N.W.2d 775, 790 (1975), cert. denied, 424 U.S. 902, 96 S.Ct. 1093, 47 L.Ed.2d 307 (1976).

There are three exceptions to the rule that an at-will employment contract is terminable for any reason or no reason. First, if there is independent consideration beyond personal employment services, a contract may be created limiting discharge to cases where there is good cause for the discharge. *See Hunt v. IBM Mid America Employees Federal Credit Union*, 384 N.W.2d 853, 856, n. 7 (1986); *Bussard v. College of Saint Thomas, Inc.*, 294 Minn. 215, 223, 200 N.W.2d 155, 161 (1972). Second, promissory estoppel principles may be used to imply an employment contract in an at-will situation. *See Hunt*, 384 N.W.2d at 856, n. 7; *Grouse v. Group Health Plan, Inc.*, 306 N.W.2d 114, 116 (Minn. 1981). Third, if termination provisions in an employee manual are sufficiently definite to meet the requirements of a unilateral contract, a discharged employee may maintain an action for breach of contract if the manual terms are not followed. *See Lewis v. Equitable Life Assurance Soc.*, 389 N.W.2d 876, 883 (Minn. 1986); *Hunt*, 384 N.W.2d at 856; *Pine River State Bank v. Mettille*, 333 N.W.2d 622, 627 (Minn. 1983).

In *Pine River State Bank*, the supreme court established the requirements of a claim that a unilateral contract is created through adoption of language in an employee manual:

> Generally speaking, a promise of employment on particular terms of unspecified duration, if in form an offer, and if accepted by the employee, may create a binding unilateral contract. The offer must be definite in form and must be communicated to the offeree. Whether a proposal is meant to be an offer for a unilateral contract is determined by the outward manifestations of the parties, not by their subjective intentions. * * * An employer's general statements of policy are no more than that and do not meet the contractual requirements for an offer. Thus, in *Degen v. Investors Diversified Services, Inc.*, 260 Minn. 424, 110 N.W.2d 863 (1961), where the employee was told he had a great future with the company and to consider his job as a "career situation," we said these statements did not constitute an offer for a lifetime employment contract.
>
> If the handbook language constitutes an offer, and the offer has been communicated by dissemination of the handbook to the employee, the next question is whether there has been an acceptance of the offer and consideration furnished for its enforceability. In the case of unilateral contracts for employment, where an at-will employee retains employment with knowledge of new or changed conditions, the new or changed conditions may become a contractual obligation. In this manner, an original employment contract may be modified or replaced by a subsequent unilateral contract. The employee's retention of employment constitutes acceptance of the offer of a unilateral contract; by continuing to stay on the job, although free to leave, the employee supplies the necessary consideration for the offer. * * *

Pine River, 333 N.W.2d at 626–27. The supreme court specifically held that job security provisions in a subsequently adopted employee handbook are enforceable. 333 N.W.2d at 627.

In *Lewis v. Equitable Life Assurance Soc.*, 389 N.W.2d 876, 883 (Minn. 1986), the supreme court stated that the determination of "[w]hether a proposal constitutes an offer for a unilateral contract is determined by the outward manifestations of the parties, not by their subjective intentions." If "the intent of the parties is totally ascertainable from the writing, construction is for the court." *Hunt v. IBM Mid America Employees Federal Credit Union*, 384 N.W.2d 853, 856 (Minn. 1986); *Donnay v. Boulware*, 275 Minn. 37, 44, 144 N.W.2d 711, 716 (1966). In *Hunt*, the court stated that "[t]he general rule is that 'the construction of a writing which is unambiguous is for the court, particularly when the intention of the parties is to be gained wholly from the writing.' " 384 N.W.2d at 856, citing *Rooney v. Dayton-Hudson Corp.*, 310 Minn. 256, 262, n. 2, 246 N.W.2d 170, 173, n. 2 (1976); *see* *also Gates Rubber Co. v. Porwoll*, 395 N.W.2d 92, 96 (Minn. Ct. App. 1986), appeal after remand, Estate of Porwoll v. Gates Rubber Co., 1989 WL 35614 (Minn. Ct. App. 1989), rev. denied (Minn. June 21, 1989). The court in *Hunt* stated that where the issue that is to be decided is the "nature and effect of a writing * * * the general rule is particularly applicable." *Hunt*, 384 N.W.2d at 856. The terms of a contract are ambiguous if "reasonably susceptible to more than one construction." *Lewis*, 389 N.W.2d at 884. If ambiguity exists, and the construction is dependent on extrinsic facts, the construction issue is for the jury. *Lewis*, 389 N.W.2d at 884.

The supreme court discussed the measure of damages in employment cases in *Portlance v. Golden Valley State Bank*, 405 N.W.2d 240 (Minn. 1987):

> We have frequently stated that the damages recoverable for a breach of contract are only those flowing from the breach except in exceptional cases in which the breach of contract constitutes or is accompanied by an independent tort. More particularly, we have held that the measure of damages for breach of an employment contract is the compensation which an employee who has been wrongfully discharged would have received had the contract been carried out according to its terms. In *Pine River* we approved an award of damages for breach of an employment contract by wrongful discharge measured by lost wages to the date of trial. * * *

Portlance v. Golden Valley State Bank, 405 N.W.2d at 243 (citations omitted); *see also Feges v. Perkins Restaurants, Inc.*, 483 N.W.2d 701, 709 (Minn. 1992); *Pine River State Bank v. Mettille*, 333 N.W.2d 622, 632 (Minn. 1983).

In *Feges v. Perkins Restaurants, Inc.*, 483 N.W.2d 701, 710 (Minn. 1992), the supreme court held that:

> [O]rdinarily, it is error to instruct the jury in a breach of an employment contract case that only damages suffered before the trial are recoverable. The jury should be instructed that damages for breach of an employment contract consist of the compensation which an employee who has been wrongfully discharged would have received if the contract had been carried out according to its terms.

Whistleblower Claims

M.S.A. § 181.932 governs the termination of employment in cases where the employee has reported violations of law or engaged in other similar conduct. The legislature enacted the statute in 1987, and amended it in 1988 and again in 2013. The statute was originally enacted while the supreme court was considering *Phipps v. Clark Oil and Refining Corp.*, 408 N.W.2d 569 (Minn. 1987). The supreme court apparently relied on the new legislation in finding that a cause of action existed for discharges in violation of public policy.

In *Kratzer v. Welsh Companies, LLC*, 771 N.W.2d 14, 19 (Minn.

2009), the supreme court stated that "[t]o state a claim under the whistleblower statute, the employee does not need to identify in the report the exact law that is violated, but the conduct reported must at least implicate a federal or state law." Citing *Abraham v. County of Hennepin*, 639 N.W.2d 342, 354–55 (Minn.2002) ("A whistleblower claim need not identify the specific law or rule that the employee suspects has been violated, so long as there is a federal or state law or rule adopted pursuant to law that is implicated by the employee's complaint, the employee reported the violation or suspected violation in good faith, and the employee alleges facts that, if proven, would constitute a violation of law or rule adopted pursuant to law.").

In *Kidwell v. Sybaritic, Inc.*, 784 N.W.2d 220, 227 (Minn.2010), the supreme court recognized that prior Minnesota Court of Appeals decisions as well as decisions from federal courts applying Minnesota law have held that the Whistleblower Act does not protect employees whose job duties require them to ensure legal compliance (citing *Skare v. Extendicare Health Servs., Inc.*, 515 F.3d 836, 841 (8th Cir.2008)). *See also Freeman v. Ace Tel. Ass'n*, 404 F.Supp.2d 1127, 1139 (D.Minn. 2005), *aff'd*, 467 F.3d 695 (8th Cir.2006); *Grundtner v. Univ. of Minn.*, 730 N.W.2d 323, 330 (Minn.App.2007); *Gee v. Minn. State Colls. and Univs.*, 700 N.W.2d 548, 555–56 (Minn. Ct. App.2005); *Michaelson v. Minn. Mining & Mfg. Co.*, 474 N.W.2d 174, 180 (Minn. Ct. App.1991), *aff'd mem.*, 479 N.W.2d 58 (Minn.1992).

The plurality opinion in *Kidwell* held "that the whistleblower statute does not contain a job duties exception," but also said that "we do not go so far as to hold than an employee's job duties are irrelevant in determining whether an employee has engaged in protected conduct." 784 N.W.2d at 227. The plurality also the court's admonition in *Obst v. Microtron, Inc.*, 614 N.W.2d 196 (Minn. 2000), that to sustain a whistleblowing claim the report "must be 'made for the purpose of exposing an illegality and not a vehicle, identified after the fact, to support a belated whistle-blowing claim.'" *Kidwell*, 784 N.W.2d at 227, quoting *Obst*, 614 N.W.2d at 202. Making the good faith determination requires consideration not only of "the content of the report, but also the employee's purpose in making the report." Examination of an employee's job duties "could be helpful in answering this central question." *Kidwell*, 784 N.W.2d at 227. Applying this reasoning, the plurality held that the plaintiff's communication of corporate wrongdoing was nothing "other than the performance of his assigned responsibilities as in-house counsel." 784 N.W.2d at 230.

The supreme court has held that the Whistleblower Act is not "limited to reports that implicate public policy." *Anderson-Johanningmeier v. Mid-Minnesota Women's Center, Inc.*, 637 N.W.2d 270, 277 (Minn. 2002):

> Because section 181.932, subd. 1(a), clearly and unambiguously protects reports made of a violation of any federal or state law or rule adopted pursuant to law, we will not look beyond its text to search for an unexpressed public policy requirement.

In *Abraham v. County of Hennepin*, 639 N.W.2d 342 (Minn. 2002), the plaintiffs alleged that their discharges were retaliatory and violated both the Whistleblower Act, M.S.A. § 181.935(a) (2000), and the Minnesota Occupational Safety and Health Act (MOSHA), M.S.A. § 182.699, subd. 1 (2000). The Minnesota Supreme Court held that claims for retaliatory discharge, seeking only money damages, brought under the remedy provisions of both the Whistleblower Act and MOSHA, may be pursued concurrently in one action. The court had previously held, in *Williams v. St. Paul Ramsey Med. Ctr., Inc.*, 551 N.W.2d 483, 486 (Minn. 1996), that an employee may not pursue concurrent claims on the same facts under the Whistleblower Act and the Minnesota Human Rights Act (MHRA). As the court in *Abraham* emphasized, *Williams* reached that holding "because the MHRA expressly provides that its procedure, while pending, shall be exclusive." *Abraham,* 639 N.W.2d at 347, *citing* M.S.A. § 363.11 (2000). Since neither the Whistleblower Act nor MOSHA contain exclusivity provisions, it follows that their remedies are not exclusive.

The court in *Abraham* also held that a plaintiff bringing an action in district court under the Whistleblower Act and MOSHA, alleging the tort of retaliatory discharge and seeking only monetary damages, has a constitutional right to a jury trial. *Abraham*, 639 N.W.2d at 354. Reasoning that the plaintiffs' claims for retaliatory discharge were a "species of the common law action of wrongful discharge," 639 N.W.2d at 350, and that the wrongful discharge claims sounded in tort, the court concluded that the nature and character of the controversy support the conclusion that a whistleblower claim seeking only money damages is an action at law. In *Schmitz v. U.S. Steel Corp.*, 831 N.W.2d 656, 680-81 (Minn. Ct. App. 2013), the court of appeals noted that "the cause of action in *Abraham* carried a constitutional right to a jury trial not because it was the codification of an existing common law cause of action—the common law cause of action recognized in *Phipps* is materially different from a claim brought under the whistleblower act—the claim carried a constitutional right to a jury trial because it was legal in nature."

The Minnesota Legislature amended the whistleblower statute in 2013 by, among other things, adding a definition of "good faith." In *Obst v. Microtron, Inc.*, 614 N.W. 2d 196 (Minn. 2000), the Minnesota Supreme Court held that for a report to be made in good faith it must be made for the purpose of exposing an illegality. In *Gee v. Minnesota State Colleges and Universities*, 700 N.W.2d 548 (Minn. Ct. App. 2005), the Minnesota Court of Appeals, relying on *Obst*, held that good faith must be determined at the time the report is made. Both *Obst* and *Gee* predate the 2013 amendments, and neither has been reversed or overturned.

In *Obst* the supreme court considered an appeal in a jury trial in which the plaintiff recovered against the defendant for retaliatory discharge, in violation of Minnesota's whistle-blower statute, M.S.A. § 181.932, subd. 1(a) (1998). Following the trial court's denial of the defendant's motion for judgment notwithstanding the verdict or, in the alternative, a new trial, the defendant appealed. The court of appeals reversed, concluding that the plaintiff had not established a violation of the whistle-blower statute. The supreme court affirmed. The supreme court made several points in its discussion of the whistle-blower statute. First the court noted that

> Minnesota's whistle-blower statute protects an employee who, in "good faith, reports a violation or suspected violation of any federal or state law or rule adopted pursuant to law to an employer or to any governmental body or law enforcement official . . . . While there need not be an actual violation of law, the reported conduct must at least implicate a violation of law . . . . When interpreting the whistle-blower statute, we have suggested that it protects the conduct of a neutral party "who 'blows the whistle' for the protection of the general public or, at the least, some third person or persons in addition to the whistleblower.

614 N.W.2d at 200 (citations omitted).

The supreme court in *Obst* stated that the employer's report of the suspected violation of law must be made in good faith and that the good faith determination involves an examination of both the content of the report and also the reporter's purpose in making the report. The reason for the requirement is to guarantee that the report "was in fact a report made for the purpose of exposing an illegality and not a vehicle identified after the fact, to support a belated whistle-blowing claim." 614 N.W.2d at 202. The court noted in the context of the facts of the case, that Ford Motor Company, the entity effected by the suspected violation, was aware that it was receiving defective windshield washer control modules from the plaintiff's employer. The court focused on its analysis on the plaintiff's knowledge about the content of the reports at the time the reports were made, rather than on his knowledge or understanding of the federal law he thought was being violated.

The *Obst* court's holding that the plaintiff did not act in good faith hinged on the fact that the plaintiff reported information that was widely known by both Ford and the plaintiff's employer, although the court noted that that fact will not always be conclusive:

> This is not to say that whenever an employer establishes that it or another entity receiving a report of a violation or suspected violation of law from an employee knows of the violation before the report is made, that the employer can escape liability under the whistle-blower statute. We are only saying that on the facts presented here, Obst cannot be said to have been trying to expose what was so openly known and acknowledged by both Ford and Microtron. Therefore, we conclude, as a matter of law, that Obst's reports to Microtron about Microtron shipping defective wiper

> control modules to Ford did not constitute good faith reports under the whistleblower-statute. We note that our conclusion does not turn on Obst's knowledge or understanding of 49 U.S.C. § 30118 when making his reports to Microtron. It turns on the content of his reports and his purpose in making the reports at the time they were made.

614 N.W.2d at 203.

In a footnote, the court noted that there are several situations where an employer's previous knowledge might not lead to a conclusion that the employee did not act in good faith in reporting:

> For example, there may be instances in which the employee is unaware that the employer already knows of the alleged violation and employee otherwise acts in good faith. Or there may be instances in which the employee, aware that the employer has knowledge of the alleged violation, in addition to reporting to the employer, also reports to a governmental body or law enforcement official.

614 N.W.2d at 203 n. 5.

The court also held that "it is clear that the report of a suspected violation of federal or state law must implicate an actual federal or state law and not one that does not exist." 614 N.W.2d at 204. While the plaintiff's report raised safety concerns, the court noted that more is required. The reports have to "implicate a violation or suspected violation of a federal or state law or rule adopted pursuant to law." 614 N.W.2d at 204.

An employee need not identify the specific law that the employee believes was violated, "so long as there is a federal or state law or rule adopted pursuant to law that is implicated by the employees complaint . . . and the employee alleges facts that, if proven would constitute a violation of law or rule adopted pursuant to law." *Abraham v. County of Hennepin*, 639 N.W.2d 342, 355 (Minn. 2002).

In *Gee v. Minnesota State Colleges and Universities*, 700 N.W.2d 548, 555 (Minn. Ct. App. 2005), the Minnesota Court of Appeals, relying on *Obst* and *Abraham,* affirmed the dismissal of a whistleblower claim on the basis that a professor's comments at staff meetings concerning the amount of funds in a student organization's account did not constitute a good-faith report of violation of state or federal law or rule. The district court concluded and the Minnesota court of appeals affirmed that at the time of the report, Gee did not have a good faith belief that a violation had occurred, as Gee had stated in her deposition that she made the inquiries to fulfill her responsibilities as a faculty adviser to the student organization and not because she suspected any illegal activity. Similarly, when she conveyed the information to her coworkers, she did so, not with the purpose of exposing an illegality, but to contradict an assertion that the organization had plenty of money. 700 N.W.2d at 556.

In *Grundtner v. University of Minnesota*, 730 N.W.2d 323 (Minn. Ct. App. 2007), the court of appeals held that the plaintiff had failed to make a prima facie showing of retaliatory discharge. *Citing Obst*, the court stated, “To engage in a protected activity an employee must make a good-faith report that implicates a violation or suspected violation of federal or state law or rule adopted pursuant to law.” *Grundtner*, 730 N.W.2d at 329. The plaintiff in *Grundtner* reported that a University employee had proposed an allegedly illegal procurement method, but it was undisputed that the University had not proceeded with that proposed method. The court concluded that the facts asserted by the plaintiff, that “[the other employee] had ‘proposed’ using an improper procurement method but did not, if proven, do not constitute a violation of law.” *Grundtner*, 730 N.W.2d at 330.

CIVJIG 55.35

EMPLOYMENT CONTRACTS—HANDBOOKS OR MANUALS

Employee handbook

A provision in an employee (handbook) (manual) is binding when the provision is part of a contract between the employer and employee.

This means the employer offers employment [continued employment] with the provision as part of the terms of employment and the employee accepts that offer.

USE NOTE

For specific instructions covering the elements of contract formation, *see* CIVJIG 20.10 (Elements); 20.15 (Offer); 20.20 (Acceptance); 20.40 (Consideration); *and* 20.45 (Breach). For additional instructions concerning employment litigation, *see* 8th Cir. Civil Jury Instr. § 4.70 (2013).

AUTHORITIES

Where a hiring is for an indefinite period of time the employment is "at-will." *Pine River State Bank v. Mettille*, 333 N.W.2d 622, 627 (Minn. 1983). In such cases, the employer is entitled to "summarily dismiss the employee for any reason or no reason," and "the employee, on the other hand, is under no obligation to remain on the job." 333 N.W.2d at 627, *citing Cederstrand v. Lutheran Bhd.*, 263 Minn. 520, 532, 117 N.W.2d 213, 221 (1962). The employment relationship is terminable at the will of either party. *See Lewis v. Equitable Life Assurance Soc.*, 389 N.W.2d 876, 882 (Minn. 1986); *Thomsen v. Independent School Dist. No. 91, Carlton County, Barnum*, 309 Minn. 391, 392, 244 N.W.2d 282, 284 (1976); *Cederstrand v. Lutheran Brotherhood*, 263 Minn. 520, 532, 117 N.W.2d 213, 221 (1962); *Ziegler v. Leo A. Hoffmann Center, Inc.*, 397 N.W.2d 378, 382 (Minn. Ct. App. 1986), review denied, Feb. 13, 1987; *Gates Rubber Co. v. Porwoll*, 395 N.W.2d 92, 96 (Minn. Ct. App. 1986); *Brookshaw v. South St. Paul Feed, Inc.*, 381 N.W.2d 33, 36 (Minn. Ct. App. 1986), rev. denied (Minn. April 11, 1986).

The supreme court has not read an implied covenant of good faith into employment contracts. *See Hunt v. IBM Mid America Employees Federal Credit Union*, 384 N.W.2d 853, 858 (Minn. 1986); *Wild v. Rarig*, 302 Minn. 419, 444, 234 N.W.2d 775, 790 (1975), cert. denied, 424 U.S. 902, 96 S.Ct. 1093, 47 L.Ed.2d 307 (1976).

However, there are three exceptions to the rule that an at-will employment contract is terminable for any reason or no reason. First, if there is independent consideration beyond personal employment services, a contract may be created limiting discharge to cases where there is good cause for the discharge. *See Hunt v. IBM Mid America Employees Federal Credit Union*, 384 N.W.2d 853, 856, n. 7 (1986); *Bussard v. College of Saint Thomas, Inc.*, 294 Minn. 215, 223, 200 N.W.2d 155, 161 (1972). Second, promissory estoppel principles may be used to imply an employment contract in an at-will situation. *See Hunt*, 384 N.W.2d at 856, n. 7; *Grouse v. Group Health Plan, Inc.*, 306 N.W.2d 114, 116 (Minn. 1981). Third, if termination provisions in an employee manual are sufficiently definite to meet the requirements of a unilateral contract, a discharged employee may maintain an action for breach of contract if the manual terms are not followed. *See Lewis v. Equitable Life Assurance Soc.*, 389 N.W.2d 876, 883 (Minn. 1986); *Hunt*, 384 N.W.2d at 856; *Pine River State Bank v. Mettille*, 333 N.W.2d 622, 627 (Minn. 1983).

In *Pine River State Bank*, the supreme court established the requirements of a claim that a unilateral contract is created through adoption of language in an employee manual:

> Generally speaking, a promise of employment on particular terms of unspecified duration, if in form an offer, and if accepted by the employee, may create a binding unilateral contract. The offer must be definite in form and must be communicated to the offeree. Whether a proposal is meant to be an offer for a unilateral contract is determined by the outward manifestations of the parties, not by their subjective intentions. * * * An employer's general statements of policy are no more than that and do not meet the contractual requirements for an offer. Thus, in *Degen v. Investors Diversified Services, Inc.*, 260 Minn. 424, 110 N.W.2d 863 (1961), where the employee was told he had a great future with the company and to consider his job as a "career situation," we said these statements did not constitute an offer for a lifetime employment contract.
>
> If the handbook language constitutes an offer, and the offer has been communicated by dissemination of the handbook to the employee, the next question is whether there has been an acceptance of the offer and consideration furnished for its enforceability. In the case of unilateral contracts for employment, where an at-will employee retains employment with knowledge of new or changed conditions, the new or changed conditions may become a contractual obligation. In this manner, an original employment contract may be modified or replaced by a subsequent unilateral contract. The employee's retention of employment constitutes acceptance of the offer of a unilateral contract; by continuing to stay on the job, although free to leave, the employee supplies the necessary consideration for the offer. * * *

Pine River, 333 N.W.2d at 626–27.

In *Pine River*, the supreme court specifically held that job security provisions in a subsequently adopted employee handbook are enforceable. 333 N.W.2d at 627.

In *Lewis v. Equitable Life Assurance Soc.*, 389 N.W.2d 876, 883 (Minn. 1986), the supreme court stated that the determination of "[w]hether a proposal constitutes an offer for a unilateral contract is determined by the outward manifestations of the parties, not by their subjective intentions." If "the intent of the parties is totally ascertainable from the writing, construction is for the court." *Hunt v. IBM Mid America Employees Federal Credit Union*, 384 N.W.2d 853, 856 (Minn. 1986); *Donnay v. Boulware*, 275 Minn. 37, 44, 144 N.W.2d 711, 716 (1966). In *Hunt*, the court stated that "[t]he general rule is that 'the construction of a writing which is unambiguous is for the court, particularly when the intention of the parties is to be gained wholly from the writing.' " 384 N.W.2d at 856, citing *Rooney v. Dayton-Hudson Corp.*, 310 Minn. 256, 262, n. 2, 246 N.W.2d 170, 173, n. 2 (1976); *see also Gates Rubber Co. v. Porwoll*, 395 N.W.2d 92, 96 (Minn. Ct. App. 1986), appeal after remand, Estate of Porwoll v. Gates Rubber Co., 1989 WL 35614 (Minn. Ct. App. 1989), rev. denied (Minn. June 21, 1989). The court in *Hunt* stated that where the issue that is to be decided is the "nature and effect of a writing * * * the general rule is particularly applicable." *Hunt*, 384 N.W.2d at 856.

The terms of a contract are ambiguous if "reasonably susceptible to more than one construction." *Lewis*, 389 N.W.2d at 884. If ambiguity exists, and the construction is dependent on extrinsic facts, the construction issue is for the jury. 389 N.W.2d at 884.

Research References

West's Key Number Digest
Labor and Employment ⚷1235

CIVJIG 55.40

EMPLOYMENT CONTRACTS—ACCEPTANCE

[The Committee recommends no instruction.]

USE NOTE

The special verdict form should be worded to incorporate the fact question that will be determinative of the acceptance issue.

AUTHORITIES

In *Pine River State Bank v. Mettille*, 333 N.W.2d 622 (Minn. 1983), the supreme court stated that:

> In the case of unilateral contracts for employment, where an at-will employee retains employment with knowledge of new or changed conditions, the new or changed conditions may become a contractual obligation. In this manner, an original employment contract may be modified or replaced by a subsequent unilateral contract. The employee's retention of employment constitutes acceptance of the offer of a unilateral contract. * * *

333 N.W.2d at 627.

Research References

West's Key Number Digest
Labor and Employment ⚷1250

CIVJIG 55.45

EMPLOYMENT CONTRACTS—CONSIDERATION

[The Committee recommends no instruction.]

USE NOTE

The special verdict form should be written to incorporate the fact question that will resolve the consideration issue.

AUTHORITIES

In *Pine River State Bank v. Mettille*, 333 N.W.2d 622 (Minn. 1983), the supreme court held that, where there is a unilateral contract for employment, the employee supplies the necessary consideration for the employer's offer to be bound by new or changed conditions of employment by continuing to stay on the job, although free to leave. 333 N.W.2d at 627.

Research References

West's Key Number Digest
Labor and Employment ⚷1247

CIVJIG 55.50

TERMINATION FOR GOOD CAUSE

Termination for good cause

> A termination is for good cause if (plaintiff) breached the standards of job performance that (defendant) established and uniformly applied.

USE NOTE

This instruction should be used in cases where the issue is whether the plaintiff was terminated for good cause. There are two questions involved in this instruction. One is whether the defendant established and uniformly applied job standards for the plaintiff. The second is whether the plaintiff breached those performance standards.

AUTHORITIES

In *Pine River State Bank v. Mettille*, 333 N.W.2d 622 (Minn. 1983), the court discussed "good cause" provisions in an employment handbook, but without taking a position on the question. The court in the case told the jury that "good cause consisted of a breach of the standards of job performance established and uniformly applied by the bank." 333 N.W.2d at 631. The court stated that the issue did not have to be decided, because it was not made an issue in the case. The term "good cause" and "just cause" were not defined in the bank's handbook. 333 N.W.2d at 631. The court made reference to *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 620–25, 292 N.W.2d 880, 895–97 (1980), concerning differences between agreements to terminate only for good cause, and agreements where "the employer may terminate whenever it is reasonably dissatisfied with the employee's performance." *Pine River*, 333 N.W.2d at 631, n. 7.

Research References

West's Key Number Digest
Labor and Employment ⚿761, 874

CIVJIG 55.55

CONDONATION

Excusing violations

> An employer cannot rely on a violation of a rule or policy to discharge an employee if the employer has repeatedly excused violations of the rule or policy in the past.

USE NOTE

This instruction is intended for use in cases where the issue is whether the employer condoned, excused, or failed to punish prior misconduct by the employee.

AUTHORITIES

In *Bautch v. Red Owl Stores, Inc.*, 278 N.W.2d 328 (Minn. 1979), the supreme court held that evidence of an employer's conduct could be considered as condonation of an employee's violation of a company policy concerning use of store food and beverages:

> An employer's condonation of an employee's wrongful conduct is a mitigating factor which may cause the employer to waive its right to discharge the employee on the basis of such misconduct. The jury was therefore entitled to consider the fact that Red Owl had never enforced the policy and that management had acquiesced in the violation of the express policy set forth in the * * * notice.

278 N.W.2d at 331 (citations omitted).

In considering the condonation doctrine in *Maschenik v. Park Nicollet Medical Ctr.*, 385 N.W.2d 362 (Minn. Ct. App. 1986), the court of appeals stated that the doctrine of condonation as stated in the *Bautch* case "describes a waiver by the employer of an employee's continuing misconduct, where such misconduct *by that employee* has gone unpunished in the past." 385 N.W.2d at 366. The court in *Maschenik* was faced with an isolated instance of employee misconduct, whereas in *Bautch* there was a continuing course of conduct. The court said that a single instance should be insufficient:

> A single incident in which the employee violated a policy without being discharged should not constitute condonation of that violation. If it did, an employer who on one occasion did not terminate the employment of an employee would be barred from discharging other employees for engaging in a similar prohibited activity.

385 N.W.2d at 366.

Research References

West's Key Number Digest
Labor and Employment ⚷761, 874

CIVJIG 55.60

BREACH OF EMPLOYMENT CONTRACT—DAMAGES

Damages for breach of an employment contract

> Damages for breach of an employment contract are the amount of compensation the employee who is wrongfully discharged would have received, if the contract had been carried out.

USE NOTE

This instruction defines the measure of damages in breach of employment contract cases. Damages for emotional harm will be limited to cases where the plaintiff is able to establish that the employer committed an independent tort, such as the intentional infliction of emotional distress.

AUTHORITIES

In *Portlance v. Golden Valley State Bank*, 405 N.W.2d 240 (Minn. 1987), the supreme court discussed the measure of damages in employment cases:

> We have frequently stated that the damages recoverable for a breach of contract are only those flowing from the breach except in exceptional cases in which the breach of contract constitutes or is accompanied by an independent tort. More particularly, we have held that the measure of damages for breach of an employment contract is the compensation which an employee who has been wrongfully discharged would have received had the contract been carried out according to its terms. In *Pine River* we approved an award of damages for breach of an employment contract by wrongful discharge measured by lost wages to the date of trial. * * *

405 N.W.2d at 243 (citations omitted); *see also Feges v. Perkins Restaurants, Inc.*, 483 N.W.2d 701, 709 (Minn. 1992); *Pine River State Bank v. Mettille*, 333 N.W.2d 622, 632 (Minn. 1983).

In *Feges v. Perkins Restaurants, Inc.*, 483 N.W.2d 701, 710 (Minn. 1992), the supreme court held that:

> [O]rdinarily, it is error to instruct the jury in a breach of an employment contract case that only damages suffered before the trial are recoverable. The jury should be instructed that damages for breach of an employment contract consist of the compensation which an

employee who has been wrongfully discharged would have received if the contract had been carried out according to its terms.

Research References

West's Key Number Digest
Labor and Employment 🔑1310, 1328(3)

CIVJIG 55.65

EMPLOYMENT TERMINATION IN VIOLATION OF PUBLIC POLICY—THE WHISTLEBLOWER ACT

Duty not to retaliate

An employer may not (discharge) (discipline) (threaten) (discriminate against) (penalize) an employee regarding the employee's (compensation) (terms of employment) (conditions of employment) (location of employment) (privileges of employment) if:

1. [The employee (person acting on the employee's behalf) in good faith reported an (actual or suspected) (planned) violation of a (state law) (federal law) (common law) (rule adopted pursuant to law) to (his/her employer) (a governmental body) (a law enforcement official)] or

[The employee is asked by a public body or office to take part in an investigation, hearing, or inquiry] or

[The employee refuses an employer's order that the employee believes, based on objective facts, violates any state or federal law or rule or regulation. The employee must inform the employer that the order is being refused for that reason] or

[The employee, in good faith, reports a situation in which the quality of health care services provided by a health care facility, organization, or health care provider violates a standard established by federal or state law or a professionally recognized national clinical or ethical standard and potentially places the public at risk of harm] or

[A public employee communicates the findings of a scientific or technical study that the employee, in good faith, believes to be truthful and accurate, including reports to a governmental body or law enforcement official] or

[An employee in the classified service of state government communicates information that the employee, in good faith, believes to be truthful and accurate, and that relates to state services, including the financing of state services, to a (legislator or the legislative auditor) (constitutional officer)] and

2. The employee's (person acting on the employee's behalf) [(report) (participation) (refusal) (communication)] [(was a motivating factor) (played a part)] in the employer's decision.

USE NOTE

The introductory paragraph in this instruction should be adapted to reflect the adverse employment action or actions at issue in the case. The statutory definition of "penalize" is set forth in CIVJIG 55.68. It includes "post-termination" conduct by the employer. Where there is an issue as to whether the employee was penalized, CIVJIG 55.68 should be given after this instruction.

CIVJIG 55.67 (Report) should be given after this instruction if there is an issue as to whether the employee made a report.

Where the employee's good faith is in issue in cases brought pursuant to M.S.A. § 181.932, subd. 1(1), CIVJIG 55.66 (Good Faith) should be given immediately after this instruction.

CIVJIG 30.60 (Corporations—Liability for Conduct of Employees) may be given in cases where there is an issue as to whether the alleged retaliator was acting in the scope of employment for the employer.

The special verdict form for whistleblower cases brought pursuant to M.S.A. § 181.932 is CIVSVF 55.94.

AUTHORITIES

Minnesota Whistleblower Act Claims

The Minnesota Whistleblower Act, M.S.A. §§ 181.931 to 181.935, imposes limits on the right of employers to "discharge, discipline, threaten, otherwise discriminate against, or penalize an employee" who in good faith reported "a violation, suspected violations, or planned violations of certain specified laws or rules "to any governmental body or law enforcement official." M.S.A. § 181.932.

The jury instruction tracks the statutory requirements of the

Whistleblower Act, M.S.A. § 181.931 that an employee's report of a violation of law or suspected violation of law must be made in "good faith."

In *Kratzer v. Welsh Companies, LLC*, 771 N.W.2d 14, 19 (Minn. 2009), the supreme court stated that "[t]o state a claim under the whistleblower statute, the employee does not need to identify in the report the exact law that is violated, but the conduct reported must at least implicate a federal or state law." Citing *Abraham v. County of Hennepin*, 639 N.W.2d 342, 354–55 (Minn.2002) ("A whistleblower claim need not identify the specific law or rule that the employee suspects has been violated, so long as there is a federal or state law or rule adopted pursuant to law that is implicated by the employee's complaint, the employee reported the violation or suspected violation in good faith, and the employee alleges facts that, if proven, would constitute a violation of law or rule adopted pursuant to law.").

In *Kidwell v. Sybaritic, Inc.*, 784 N.W.2d 220, 227 (Minn.2010), the supreme court recognized that prior Minnesota Court of Appeals decisions as well as decisions from federal courts applying Minnesota law have held that the Whistleblower Act does not protect employees whose job duties require them to ensure legal compliance (citing *Skare v. Extendicare Health Servs., Inc.*, 515 F.3d 836, 841 (8th Cir.2008)). *See also Freeman v. Ace Tel. Ass'n*, 404 F.Supp.2d 1127, 1139 (D.Minn. 2005), *aff'd*, 467 F.3d 695 (8th Cir.2006); *Grundtner v. Univ. of Minn.*, 730 N.W.2d 323, 330 (Minn.App.2007); *Gee v. Minn. State Colls. and Univs.*, 700 N.W.2d 548, 555–56 (Minn. Ct. App.2005); *Michaelson v. Minn. Mining & Mfg. Co.*, 474 N.W.2d 174, 180 (Minn. Ct. App.1991), *aff'd mem.*, 479 N.W.2d 58 (Minn.1992).

The plurality opinion in *Kidwell* held "that the whistleblower statute does not contain a job duties exception," but also said that "we do not go so far as to hold than an employee's job duties are irrelevant in determining whether an employee has engaged in protected conduct." 784 N.W.2d at 227. The plurality also the court's admonition in *Obst v. Microtron, Inc.*, 614 N.W.2d 196 (Minn. 2000), that to sustain a whistleblowing claim the report "must be 'made for the purpose of exposing an illegality and not a vehicle, identified after the fact, to support a belated whistle-blowing claim.' " *Kidwell*, 784 N.W.2d at 227, quoting *Obst*, 614 N.W.2d at 202. Making the good faith determination requires consideration not only of "the content of the report, but also the employee's purpose in making the report." Examination of an employee's job duties "could be helpful in answering this central question." *Kidwell*, 784 N.W.2d at 227. Applying this reasoning, the plurality held that the plaintiff's communication of corporate wrongdoing was nothing "other than the performance of his assigned responsibilities as in-house counsel." 784 N.W.2d at 230.

The supreme court has held that the Whistleblower Act is not "limited to reports that implicate public policy." *Anderson-Johanningmeier v. Mid-Minnesota Women's Center, Inc.*, 637 N.W.2d 270, 277 (Minn. 2002):

> Because section 181.932, subd. 1(a), clearly and unambiguously protects reports made of a violation of any federal or state law or rule adopted pursuant to law, we will not look beyond its text to search for an unexpressed public policy requirement.

In *Abraham v. County of Hennepin*, 639 N.W.2d 342 (Minn. 2002), the plaintiffs alleged that their discharges were retaliatory and violated both the Whistleblower Act, M.S.A. § 181.935(a) (2000), and the Minnesota Occupational Safety and Health Act (MOSHA), M.S.A. § 182.699, subd. 1 (2000). The Minnesota Supreme Court held that claims for retaliatory discharge, seeking only money damages, brought under the remedy provisions of both the Whistleblower Act and MOSHA, may be pursued concurrently in one action. The court had previously held, in *Williams v. St. Paul Ramsey Med. Ctr., Inc.*, 551 N.W.2d 483, 486 (Minn. 1996), that an employee may not pursue concurrent claims on the same facts under the Whistleblower Act and the Minnesota Human Rights Act (MHRA). As the court in *Abraham* emphasized, *Williams* reached that holding "because the MHRA expressly provides that its procedure, while pending, shall be exclusive." *Abraham,* 639 N.W.2d at 347, *citing* M.S.A. § 363.11 (2000). Since neither the Whistleblower Act nor MOSHA contain exclusivity provisions, it follows that their remedies are not exclusive.

The court in *Abraham* also held that a plaintiff bringing an action in district court under the Whistleblower Act and MOSHA, alleging the tort of retaliatory discharge and seeking only monetary damages, has a constitutional right to a jury trial. *Abraham*, 639 N.W.2d at 354. Reasoning that the plaintiffs' claims for retaliatory discharge were a "species of the common law action of wrongful discharge," 639 N.W.2d at 350, and that the wrongful discharge claims sounded in tort, the court concluded that the nature and character of the controversy support the conclusion that a whistleblower claim seeking only money damages is an action at law. In *Schmitz v. U.S. Steel Corp.*, 831 N.W.2d 656, 680–81 (Minn. Ct. App. 2013), the court of appeals noted that "the cause of action in *Abraham* carried a constitutional right to a jury trial not because it was the codification of an existing common law cause of action—the common law cause of action recognized in *Phipps* is materially different from a claim brought under the whistleblower act—the claim carried a constitutional right to a jury trial because it was legal in nature."

Common Law Claims

In *Phipps v. Clark Oil & Refining Corp.*, 408 N.W.2d 569, 571 (Minn. 1987) the supreme court held "that an employee may bring an action for wrongful discharge if that employee is discharged for refusing to participate in an activity that the employee, in good faith, believes violates any state or federal law or rule or regulation adopted pursuant to law." The Whistleblower Act was enacted after oral argument in the case, creating the possibility of parallel common law and statutory claims in whistleblower cases. In *Nelson v. Productive Alternatives, Inc.*, 715 N.W.2d 452, 455 & n. 3 (Minn. 2006), the court recognized the continued viability of the common law wrongful discharge claim in *Phipps*, while noting that the common law claim "may well be largely duplicative of the cause of action available under the Whistleblower Act."

In *Dukowitz v. Hannon Sec. Services*, 841 N.W.2d 147 (Minn. 2014), a case in which the plaintiff alleged that she was terminated from her job because she claimed unemployment benefits, the supreme court read *Phipps* and *Nelson* as recognizing "a common-law cause of action for wrongful discharge only in those circumstances in which a termination is the result of an employee's refusal to do an act that the employee, in good faith, believes to be illegal." Further, the court refused to extend the common law wrongful discharge claim to embrace claims for termination because of a claim for unemployment benefits, for two reasons. The first was the court's reluctance to extend the public policy embodied in the Whistleblower Act. The second was the existence of a specific statutory remedy in cases involving retaliation against a person for claiming unemployment benefits.

The Whistleblower Act

M.S.A. § 181.931, the definitional section of the Whistleblower Act, as amended in 2013, reads as follows:

> Subdivision 1. Generally. For the purpose of sections 181.931 to 181.935 the terms defined in this section have the meanings given them.
>
> Subd. 2. Employee. "Employee" means a person who performs services for hire in Minnesota for an employer. Employee does not include an independent contractor.
>
> Subd. 3. Employer. "Employer" means any person having one or more employees in Minnesota and includes the state and any political subdivision of the state.
>
> Subd. 4. Good faith. "Good faith" means conduct that does not violate section 181.932, subdivision 3.
>
> Subd. 5. Penalize. "Penalize" means conduct that might dissuade a reasonable employee from making or supporting a report, including post-termination conduct by an employer or conduct by an employer for the benefit of a third party.

M.S.A. § 181.932, as amended in 2013, reads as follows:

> Subdivision 1. Prohibited action. An employer shall not discharge, discipline, threaten, otherwise discriminate against, or penalize an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because:
>
> (1) the employee, or a person acting on behalf of an employee, in good faith, reports a violation, suspected

violation, or planned violation of any federal or state law or common law or rule adopted pursuant to law to an employer or to any governmental body or law enforcement official;

(2) the employee is requested by a public body or office to participate in an investigation, hearing, inquiry;

(3) the employee refuses an employer's order to perform an action that the employee has an objective basis in fact to believe violates any state or federal law or rule or regulation adopted pursuant to law, and the employee informs the employer that the order is being refused for that reason;

(4) the employee, in good faith, reports a situation in which the quality of health care services provided by a health care facility, organization, or health care provider violates a standard established by federal or state law or a professionally recognized national clinical or ethical standard and potentially places the public at risk of harm;

(5) a public employee communicates the findings of a scientific or technical study that the employee, in good faith, believes to be truthful and accurate, including reports to a governmental body or law enforcement official; or

(6) an employee in the classified service of state government communicates information that the employee, in good faith, believes to be truthful and accurate, and that relates to state services, including the financing of state services, to:

    (i) a legislator or the legislative auditor; or

    (ii) a constitutional officer.

The disclosures protected pursuant to this section do not authorize the disclosure of data otherwise protected by law.

Subd. 2. Disclosure of identity. The identity of any employee making a report to a governmental body or law enforcement official under subdivision 1, clause (1) or (4), is private data on individuals as defined in section 13.02. The identity of an employee providing information under subdivision 1, clause (2), is private data on individuals if:

(1) the employee would not have provided the information

> without an assurance that the employee's identity would remain private, because of a concern that the employer would commit an action prohibited under subdivision 1 or that the employee would be subject to some other form of retaliation; or
>
> (2) the state agency, statewide system, or political subdivision reasonably believes that the employee would not have provided the data because of that concern.
>
> If the disclosure is necessary for prosecution, the identity of the employee may be disclosed but the employee shall be informed prior to the disclosure.
>
> Subd. 3. False disclosures. This section does not permit an employee to make statements or disclosures knowing that they are false or that they are in reckless disregard of the truth.
>
> Subd. 4. Collective bargaining rights. This section does not diminish or impair the rights of a person under any collective bargaining agreement.
>
> Subd. 5. Confidential information. This section does not permit disclosures that would violate federal or state law or diminish or impair the rights of any person to the continued protection of confidentiality of communications provided by common law.

The 2013 amendment added definitions of "good faith" in subdivision 4, "penalize" in subdivision 5 and "report" in subdivision 6 to M.S.A. § 181.931. 2013 Minn. Sess. Law Serv. Ch. 83 (H.F. 542) (West). The amendment also added "planned violation" of state or federal law or "common law" to the discharge prohibition in M.S.A. § 181.932, subd. 1(1), and a new subpart (6) that prohibits adverse action against "an employee in the classified service of state government" who in good faith communicates information the employee believes to be truthful and accurate, and that relates to state services, to a legislator or the legislative auditor or a state constitutional officer. The amendments were effective on May 25, 2013.

M.S.A. § 181.935, the remedies provision, reads as follows:

> (a) In addition to any remedies otherwise provided by law, an employee injured by a violation of section 181.932 may bring a civil action to recover any and all damages recoverable at law, together with costs and disbursements, including reasonable attorney's fees, and may receive such injunctive and other equitable relief as determined by the court.
>
> (b) An employer who failed to notify, as required under section 181.933 or 181.934, an employee injured by a violation of section

181.932 is subject to a civil penalty of $25 per day per injured employee not to exceed $750 per injured employee.

(c) If the district court determines that a violation of section 181.932 occurred, the court may order any appropriate relief, including but not limited to reinstatement, back pay, restoration of lost service credit, if appropriate, compensatory damages, and the expungement of any adverse records of an employee who was the subject of the alleged acts of misconduct.

Research References

West's Key Number Digest
Labor and Employment ⚿759, 776, 874, 874

CIVJIG 55.66

GOOD FAITH

Good Faith

A report is not made in good faith if an employee makes the report knowing that it is false or has serious doubts about its truth.

[A report is made in good faith if it is made for the purpose of exposing illegal action.]

Good faith must be decided at the time the report is made, not after later events have occurred.

USE NOTE

This instruction is intended for use in cases where the good faith of the employee making the report is in issue in a whistleblower case brought pursuant M.S.A. § 181.932, subd. 1(1). It should be given after CIVJIG 55.65.

M.S.A. § 181.931, subd. 4, as amended in 2013, defines "good faith" as "conduct that does not violate § 181.932, subdivision 3." Subdivision 3 provides that "[c]onduct is not made in good faith if the employee makes statements or disclosures knowing that they are false or that they are in reckless disregard of the truth." In the defamation context, publication is made in reckless disregard of the truth if it is made with serious doubts about the truth of the statement. *See* CIVJIG 50.40 (Actual Malice – Constitutional Standard). The bracketed language is from the fifthedition of the Civil Jury Instruction Guides. It incorporates the good faith standard adopted by the Minnesota Supreme Court prior to the 2013 amendment adding the definition of "good faith" to the Whistleblower Act. The Committee takes no position as to whether the Legislature intended to change the standard established by the supreme court.

AUTHORITIES

The Minnesota Legislature amended the whistleblower statute in 2013 by, among other things, adding a definition of "good faith." In *Obst v. Microtron, Inc.*, 614 N.W. 2d 196 (Minn. 2000), the Minnesota Supreme Court held that for a report to be made in good faith it must be made for the purpose of exposing an illegality. In *Gee v. Minnesota State Colleges and Universities*, 700 N.W.2d 548 (Minn. Ct. App. 2005), the Minnesota Court of Appeals, relying on *Obst*, held that good faith must be determined at the time the report is made. Both *Obst* and *Gee* predate the 2013 amendments, and neither has been reversed or overturned.

This instruction comes from language in *Obst v. Microtron Inc.*, 614 N.W.2d 196 (Minn. 2000). In *Obst* the supreme court considered an appeal in a jury trial in which the plaintiff recovered against the defendant for retaliatory discharge, in violation of Minnesota's whistle-blower statute, M.S.A. § 181.932, subd. 1(a) (1998). Following the trial court's denial of the defendant's motion for judgment notwithstanding the verdict or, in the alternative, a new trial, the defendant appealed. The court of appeals reversed, concluding that the plaintiff had not established a violation of the whistle-blower statute. The supreme court affirmed. The supreme court made several points in its discussion of the whistle-blower statute. First, the court noted that

> Minnesota's whistle-blower statute protects an employee who, in "good faith, reports a violation or suspected violation of any federal or state law or rule adopted pursuant to law to an employer or to any governmental body or law enforcement official . . . . While there need not be an actual violation of law, the reported conduct must at least implicate a violation of law . . . . When interpreting the whistle-blower statute, we have suggested that it protects the conduct of a neutral party "who 'blows the whistle' " for the protection of the general public or, at the least, some third person or persons in addition to the whistleblower.

614 N.W.2d at 200 (citations omitted).

The supreme court in *Obst* stated that the employer's report of the suspected violation of law must be made in good faith and that the good faith determination involves an examination of both the content of the report and also the reporter's purpose in making the report. The reason for the requirement is to guarantee that the report "was in fact a report made for the purpose of exposing an illegality and not a vehicle identified after the fact, to support a belated whistle-blowing claim." 614 N.W.2d at 202. The court noted in the context of the facts of the case, that Ford Motor Company, the entity effected by the suspected violation, was aware that it was receiving defective windshield washer control modules from the plaintiff's employer. The court focused on its analysis on the plaintiff's knowledge about the content of the reports at the time the reports were made, rather than on his knowledge or understanding of the federal law he thought was being violated.

The *Obst* court's holding that the plaintiff did not act in good faith hinged on the fact that the plaintiff reported information that was widely known by both Ford and the plaintiff's employer, although the court noted that that fact will not always be conclusive:

> This is not to say that whenever an employer establishes that it or

> another entity receiving a report of a violation or suspected violation of law from an employee knows of the violation before the report is made, that the employer can escape liability under the whistle-blower statute. We are only saying that on the facts presented here, Obst cannot be said to have been trying to expose what was so openly known and acknowledged by both Ford and Microtron. Therefore, we conclude, as a matter of law, that Obst's reports to Microtron about Microtron shipping defective wiper control modules to Ford did not constitute good faith reports under the whistleblower-statute. We note that our conclusion does not turn on Obst's knowledge or understanding of 49 U.S.C. § 30118 when making his reports to Microtron. It turns on the content of his reports and his purpose in making the reports at the time they were made.

614 N.W.2d at 203.

In a footnote, the court noted that there are several situations where an employer's previous knowledge might not lead to a conclusion that the employee did not act in good faith in reporting:

> For example, there may be instances in which the employee is unaware that the employer already knows of the alleged violation and employee otherwise acts in good faith. Or there may be instances in which the employee, aware that the employer has knowledge of the alleged violation, in addition to reporting to the employer, also reports to a governmental body or law enforcement official.

614 N.W.2d at 203 n. 5.

The court also held that "it is clear that the report of a suspected violation of federal or state law must implicate an actual federal or state law and not one that does not exist." 614 N.W.2d at 204. While the plaintiff's report raised safety concerns, the court noted that more is required. The reports have to "implicate a violation or suspected violation of a federal or state law or rule adopted pursuant to law." 614 N.W.2d at 204.

An employee need not identify the specific law that the employee believes was violated, "so long as there is a federal or state law or rule adopted pursuant to law that is implicated by the employees complaint . . . and the employee alleges facts that, if proven would constitute a violation of law or rule adopted pursuant to law." *Abraham v. County of Hennepin*, 639 N.W.2d 342, 355 (Minn. 2002).

In *Gee v. Minnesota State Colleges and Universities*, 700 N.W.2d 548, 555 (Minn. Ct. App. 2005), the Minnesota Court of Appeals, relying on *Obst* and *Abraham,* affirmed the dismissal of a whistleblower claim on the basis that a professor's comments at staff meetings concerning the amount of funds in a student organization's account did not constitute a good-faith report of violation of state or federal law or rule. The district court concluded and the Minnesota court of appeals affirmed that at the time of the report, Gee did not have a good faith belief that a violation had occurred, as Gee had stated in her deposition that she made the inquiries to fulfill her responsibilities as a faculty adviser to the student organization and not because she suspected any illegal activity. Similarly, when she conveyed the information to her coworkers, she did so, not with the purpose of exposing an illegality, but to contradict an assertion that the organization had plenty of money. 700 N.W.2d at 556.

In *Grundtner v. University of Minnesota*, 730 N.W.2d 323 (Minn. Ct. App. 2007), the court of appeals held that the plaintiff had failed to make a prima facie showing of retaliatory discharge. Citing *Obst*, the court stated, "To engage in a protected activity an employee must make a good-faith report that implicates a violation or suspected violation of federal or state law or rule adopted pursuant to law." *Grundtner*, 730 N.W.2d at 329. The plaintiff in *Grundtner* reported that a University employee had proposed an allegedly illegal procurement method, but it was undisputed that the University had not proceeded with that proposed method. The court concluded that the facts asserted by the plaintiff, that "[the other employee] had 'proposed' using an improper procurement method but did not, if proven, do not constitute a violation of law." *Grundtner*, 730 N.W.2d at 330.

Research References

West's Key Number Digest
Labor and Employment ⚿842, 874

CIVJIG 55.67

REPORT

Definition of report

> "Report" means a verbal, written, or electronic communication by an employee about an actual, suspected, or planned violation of a statute, regulation, or common law, whether committed by an employer or a third party.

USE NOTE

This instruction is intended for use in whistleblower cases where there is an issue whether the employee made a "report" as that term is defined in M.S.A. § 181.932. It should be given after CIVJIG 55.65.

M.S.A. § 181.931, subd. 6, as amended in 2013, defines "report" for purposes of a whistleblower claim brought pursuant to M.S.A. § 181.932.

CIVJIG 55.68

PENALIZE

Definition of penalize

> "Penalize" means conduct by an employer that might dissuade a reasonable employee from making or supporting a report, including post-termination conduct by an employer or conduct by an employer for the benefit of a third party.

USE NOTE

This instruction is intended for use in whistleblower cases where the alleged adverse employment action took the form of a penalty imposed by the employer, and the jury is asked to decide whether the employer penalized the employee. It should be given after CIVJIG 55.65.

M.S.A. § 181.931, subd. 5, as amended in 2013, defines "penalize" for purposes of a whistleblower claim brought pursuant to M.S.A. § 181.932.

SPECIAL VERDICT FORMS

CIVSVF 55.90

EMPLOYER'S DUTY TO PROVIDE SAFE PLACE TO WORK

1. Was (employer) negligent in failing to provide (plaintiff) with a safe place to work?

   ________ Yes or No

2. *If your answer to Question 1 was "Yes," then answer this question*: Was this negligence by (employer) a direct cause of (plaintiff's) injury?

   ________ Yes or No

If your answer to Question 2 was 'Yes,' then answer Questions 3 and 4.

3. What amount of money will fairly and adequately compensate (plaintiff) for damages directly caused by (employer's) actions, up to the time of this verdict, for:

   a. Past pain, disability, and emotional distress? $________
   b. Past wage loss? $________
   c. Past health care expenses? $________

4. What amount of money will fairly and adequately compensate (plaintiff) for damages reasonably certain to occur in the future, directly caused by (employer's) negligence for:

   a. Future pain, disability, and emotional distress? $________
   b. Loss of future earning capacity? $________
   c. Future health care expenses? $________

USE NOTE

This special verdict form is intended for use in cases where an employer's negligence becomes relevant. It could be used in cases where the employer is sued directly by an employee, as in cases where the Workers' Compensation act does not apply, or where the employer is sued on a third party claim, as in a products liability claim by an injured employee against a product manufacturer.

The special verdict questions and their supporting jury instructions are as follows:

1. CIVJIG 55.31: Employer—Duty to Use Reasonable Care to Provide a Safe Place to Work.

2. CIVJIG 27.10: Direct Cause.

3a. CIVJIG 91.10: Items of Personal Damage—Post Damage—Bodily and Mental Harm.

3b. CIVJIG 91.20: Items of Personal Damage—Post Damage—Loss of Earnings.

3c. CIVJIG 91.15: Items of Personal Damage—Post Damage—Medical Supplies.

4a. CIVJIG 91.25: Items of Personal Damage—Future Damage—Medical Supplies.

4b. CIVJIG 91.35: Items of Personal Damage—Future Damage—Loss of Earning Capacity.

4c. CIVJIG 91.30: Items of Personal Damage—Future Damage—Medical Supplies, Hospital, and Medical Expense.

CIVSVF 55.91

NEGLIGENT HIRING, RETENTION, OR SUPERVISION

1. Did (employee) commit a battery on (plaintiff)?

_______ Yes or No

2. *If your answer to Question 1 was "Yes," then answer this question*: Was this battery a direct cause of (plaintiff's) injuries?

_______ Yes or No

3. *If your answer to Question 2 was "Yes," then answer this question*: Was (employer) negligent in (hiring) (retaining) (supervising) (employee)?

_______ Yes or No

4. *If your answer to Question 3 was "Yes," then answer this question*: Was this negligence by (employer) a direct cause of (plaintiff's) injury?

_______ Yes or No

If your answer to Question 4 was "Yes," then answer Questions 5 and 6.

5. What amount of money will fairly and adequately compensate (plaintiff) for damages directly caused by (employee's) battery, up to the time of this verdict, for:

   a. Past pain, disability and emotional distress? $_______
   b. Past wage loss? $_______
   c. Past health care expenses? $_______

6. What amount of money will fairly and adequately compensate (plaintiff) for damages reasonably certain to occur in the future, directly caused by the defendant's actions for:

   a. Future pain, disability, and emotional distress? $_______
   b. Loss of future earning capacity? $_______
   c. Future health care expenses? $_______

USE NOTE

This special verdict form is intended for use in cases where the plaintiff's theory of recovery against the employer is based on the employer's negligence in hiring, retaining, or supervising an employee who causes injury to the plaintiff. The liability of the employee may be based upon an intentional tort theory or negligence. This special verdict form is based on a battery theory, although negligence could be substituted.

Negligent hiring, retention, or supervision are set out as alternative theories in this special verdict form. More than one theory may be present in an individual case. If so, the verdict form will have to be adjusted accordingly.

The special verdict questions and their supporting jury instructions are as follows:

1. CIVJIG 60.25: Civil Battery—Definition.
2. CIVJIG 27.10: Direct Cause.
3. CIVJIG 55.20, 55.25 and 55.30: Negligent Hiring, Supervision and Retention.
4. CIVJIG 27.10: Direct Cause.

5a. CIVJIG 91.10: Items of Personal Damage—Past Damage—Bodily and Mental Harm.

5b. CIVJIG 91.20: Items of Personal Damage—Past Damage—Loss of Earnings.

5c. CIVJIG 91.15: Items of Personal Damage—Past Damage—Medical Supplies.

6a. CIVJIG 91.25: Items of Personal Damage—Future Damage—Medical Supplies.

6b. CIVJIG 91.25: Items of Personal Damage—Future Damage—Loss of Earning Capacity.

6c. CIVJIG 91.25: Items of Personal Damage—Future Damage—Medical Supplies, Hospital and Medical Expense.

CIVSVF 55.92

EMPLOYER OR CO-EMPLOYEE LIABILITY—CONSCIOUS AND DELIBERATE INTENT TO CAUSE INJURY

1. Did (employer) (employee) injure plaintiff?

____
Yes or No

2. *If your answer to Question 1 was "Yes," then answer this question*: Did (employer) (employee) consciously and deliberately intend to injure (plaintiff)?

____
Yes or No

If your answer to Question 2 was "Yes," then answer Questions 3 and 4.

3. What amount of money will fairly and adequately compensate (plaintiff) for damages, up to the time of this verdict, directly caused by (employer's) (employee's) conscious and deliberate injury of (plaintiff), up to the time of this verdict, for:

a.	Past pain, disability, and emotional distress?	$________
b.	Past wage loss?	$________
c.	Past health care expenses?	$________

4. What amount of money will fairly and adequately compensate (plaintiff), for damages reasonably certain to occur in the future, directly caused by (employer's) (employee's) conscious and deliberate injury of (plaintiff), for:

a.	Future pain, disability, and emotional distress?	$________
b.	Loss of future earning capacity?	$________
c.	Future health care expenses?	$________

USE NOTE

This special verdict form is intended for use in cases where the employer or employee consciously and deliberately intended to injure another person.

The special verdict questions and their supporting jury instructions are as follows:

1. CIVJIG 55.32: Employer or Co-Employee Liability—Conscious and Deliberate Intent to Cause Injury.
2. CIVJIG 55.32: Employer or Co-Employee Liability—Conscious and Deliberate Intent to Cause Injury.

3a. CIVJIG 91.10: Items of Personal Damage—Past Damage—Bodily and Mental Harm.

3b. CIVJIG 91.20: Items of Personal Damage—Past Damage—Loss of Earnings.

3c. CIVJIG 91.15: Items of Personal Damage—Past Damage—Medical Supplies.

4a. CIVJIG 91.25: Items of Personal Damage—Future Damage—Medical Supplies.

4b. CIVJIG 91.35: Items of Personal Damage—Future Damage—Loss of Earning Capacity.

4c. CIVJIG 91.25: Items of Personal Damage—Future Damage—Medical Supplies, Hospital, and Medical Expense.

CIVSVF 55.93

ASSAULT EXCEPTION

1. Did (third person) (employee) commit a battery on (plaintiff)?

   ____
   Yes or No

2. *If your answer to Question 1 was "Yes," then answer this question*: Was the battery committed for personal reasons?

   ____
   Yes or No

3. *If your answer to Question 2 was "Yes," then answer this question*: Was the battery related to (plaintiff's) position as an employee or to (his) (her) employment?

   ____
   Yes or No

If your answer to Question No. 3 was "Yes," then answer Questions 4 and 5.

4. What amount of money will fairly and adequately compensate (plaintiff) for damages directly caused by (employer's) (employee's) actions, up to the time of this verdict, for:
   a. Past pain, disability, and emotional distress? $________
   b. Past wage loss? $________
   c. Past health care expenses? $________

5. What amount of money will fairly and adequately compensate (plaintiff) for damages directly caused by (employer's) (employee's) actions, up to the time of this verdict, for:
   a. Future pain, disability, and emotional distress? $________
   b. Loss of future earning capacity? $________
   c. Future health care expenses? $________

USE NOTE

This special verdict form is intended for use in cases in which the assault exception to the Workers' Compensation Act applies. There are several conditions on the application of the assault exception that are covered in the verdict form. The injury must be caused intentionally. The requirements of a battery include the intent requirement. In addition, the assault (battery) on the plaintiff has to be for personal reasons and those reasons must be unrelated to the plaintiff's position as an employee or to the plaintiff's employment.

This special verdict form is intended for use in cases where the employer or employee consciously and deliberately intended to injure another person.

The special verdict questions and their supporting jury instructions are as follows:

1. CIVJIG 60.25: Civil Battery—Definition.

2. CIVJIG 55.33: Assault Exception.

3. CIVJIG 55.33: Assault.

4a. CIVJIG 91.10: Items of Personal Damage—Past Damage—Bodily and Mental Harm.

4b. CIVJIG 91.20: Items of Personal Damage—Past Damage—Loss of Earnings.

4c. CIVJIG 91.15: Items of Personal Damage—Past Damage—Medical Supplies.

5a. CIVJIG 91.25: Items of Personal Damage—Future Damage—Medical Supplies.

5b. CIVJIG 91.35: Items of Personal Damage—Future Damage—Loss of Earning Capacity.

5c. CIVJIG 91.30: Items of Personal Damage—Future Damage—Medical Supplies, Hospital, and Medical Expense.

CIVSVF 55.94

WHISTLEBLOWER

1. Did (plaintiff) (person acting on his/her) behalf, in good faith, report (an actual or suspected) (a planned) violation of (identify the state or federal law or common law or rule adopted pursuant to law) to (defendant) or (outside agency)?

______ Yes or No

2. *If your answer to Question No. 1 was "Yes" then answer this question*: Did (defendant) (discharge) (discipline) (threaten) (discriminate against) (plaintiff) (penalize plaintiff by changing his/her (pay) (terms of employment) (conditions of employment) (location of employment) (privileges of employment))?

______ Yes or No

3. *If your answer to Question No. 2 was "Yes," then answer this question:* (Was the report a motivating factor for) (Did the report play a part in) (defendant's) decision to (discharge) (discipline) (threaten) (discriminate against) (penalize) (plaintiff)?

______ Yes or No

If your answer to Question No. 3 was "Yes," then answer Questions 4 and 5.

4. What amount of money will fairly and adequately compensate (plaintiff) for damages directly caused by the defendant's decision to (discharge) (discipline) (threaten) (discriminate against) (penalize), up to the time of this verdict, for:

    a. Past pain, disability, and emotional distress? $______
    b. Past wage loss? $______
    c. Past health care expenses? $______

5. What amount of money will fairly and adequately compensate (plaintiff) for damages reasonably certain to occur in the future, directly caused by the defendant's decision to (discharge) (discipline) (threaten) (discriminate against) (penalize), for:

a. Future pain, disability, and emotional distress? $________

b. Loss of future earning capacity? $________

c. Future health care expenses? $________

USE NOTE

This special verdict form is intended for use in cases where an employee claims retaliation for blowing the whistle on the violations or suspected violations of law by the employer.

The special verdict questions and their supporting jury instructions are as follows:

1. CIVJIG 55.66: Good Faith; CIVJIG 55.67: Report.

2. CIVJIG 55.65: Employment Termination in Violation of Publication Policy—The Whistleblower Act

   CIVJIG 55.68: Penalize.

3. CIVJIG 55.65: Employment Termination in Violation of Publication Policy—The Whistleblower Act.

4a. CIVJIG 91.10: Items of Personal Damage—Past Damage—Bodily and Mental Harm.

4b. CIVJIG 91.20: Items of Personal Damage—Past Damage—Loss of Earnings.

4c. CIVJIG 91.15: Items of Personal Damage—Past Damage—Medical Supplies.

5a. CIVJIG 91.25: Items of Personal Damage—Future Damage—Medical Supplies.

5b. CIVJIG 91.35: Items of Personal Damage—Future Damage—Loss of Earning Capacity.

5c. CIVJIG 91.30: Items of Personal Damage—Future Damage—Medical Supplies, Hospital, and Medical Expense.

CATEGORY 57

FRAUD AND MISREPRESENTATION

Table of Instructions

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CIVJIG 57.15 Fraud—Reasonable Reliance
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SPECIAL VERDICT FORMS

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CIVSVF 57.91 Negligent Misrepresentation
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INTRODUCTORY NOTE

In *Specialized Tours, Inc. v. Hagen*, 392 N.W.2d 520, 532 (Minn. 1986), the Minnesota Supreme Court set out the required elements of a fraud case:

> The required elements of a fraud action are: (1) there was a false representation by a party of a past or existing material fact susceptible of knowledge; (2) made with knowledge of the falsity of the representation or made as of the party's own knowledge without knowing whether it was true or false; (3) with the intention to induce another to act in reliance thereon; (4) that the representation caused the other party to act in reliance thereon; and (5) that the party suffer pecuniary damage as a result of the reliance.

There are longer formulations, but these five elements are at the core of all fraud claims. Fraud actions may be based on intentional or negligent misrepresentations. The standard formulation of fraud includes representations made by a person with knowledge of the falsity, or without knowledge of whether the representation is true or false. A negligent misrepresentation claim has the same elements, except that the plaintiff must prove that the person making the representation failed "to exercise reasonable care or competence in obtaining or communicating the information." *Florenzano v. Olson*, 387 N.W.2d 168, 173–74 (Minn. 1986), citing Restatement (Second) of Torts § 552 (Ten. Draft No. 12 1966).

One of the keys to Minnesota fraud law is understanding the classification of fraud claims by the supreme court in *Florenzano v. Olson*, 387 N.W.2d 168 (Minn. 1986). There are two key distinctions made in the case. One is between intentional and negligent misrepresentations. The second is between two types of intentional misrepresentations, one involving cases where the representation is made with knowledge that is false, and the other where the representation is made without knowledge of whether it is true or false.

The court noted in *Florenzano* that there are two types of intentional misrepresentations. One involves "dishonesty or bad faith." No question concerning fraudulent intent exists where the person making the representation knows or believes that the matter is not as represented. However, fraudulent intent also exists when "a misrepresenter speaks positively and without qualification, but either is conscious of ignorance of the truth, or realizes that the information on which he or she relies is not adequate or dependable enough to support such a positive, unqualified assertion." 387 N.W.2d 168.

A negligent misrepresentation is made when the person making the representation "has not discovered or communicated certain information that the ordinary person in his or her position would have discovered or communicated. Proof of the subjective state of the misrepresenter's mind, whether by direct evidence or by inference, is not needed to prove negligence. Negligence is proved by measuring one's conduct against an objective standard of reasonable care or competence." 387 N.W.2d at 174. In *Bonhiver v. Graff*, 311 Minn. 111, 122, 248 N.W.2d 291, 298–299 (1976), the supreme court held that a person making a representation is held to that standard only when "supplying information, either for the guidance of others in the course of a transaction in which one has a pecuniary interest, or in the course of one's business, profession or employment."

Bonhiver relied on a tentative draft of the Restatement (Second) of Torts § 552, which reads as follows in its current form:

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
>
> > (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and

> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.
>
> (3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

Justice Simonett, concurring specially, broke fraud into three categories of actionable misrepresentations:

> [T]he first is deceit; the second, for want of a better name, I will call reckless misrepresentation; and the third is negligent misrepresentation. The first two types of fraud have always been combined under the *Davis v. Re-Trac* formulation, but now, because of the enactment of Minn. Stat. § 604.01 and today's holding, they must be separated at least for the purpose of determining whether comparative negligence or fault applies.

387 N.W.2d at 177. Justice Simonett's concurring opinion is significantly clearer than the main opinion in the case. Justice Simonett distinguishes between types of intentional tort claims. He would distinguish deceit, where the representer knows that his or her representation is false from cases where there is a reckless representation, "when the representer asserts a fact as of his own knowledge without knowing whether it is true or false." 387 N.W.2d at 177 n.2. Negligent misrepresentation is based on the Restatement (Second) of Torts § 552 (1977) quoted above. The Restatement adopts the more limited rule of liability in order to encourage the free flow of information in commercial settings.

The defendant in a negligent misrepresentation case is subject to liability only if "he has failed to exercise the care or competence of a reasonable [person] in obtaining or communicating the information . . . . What is reasonable is . . . dependent upon the circumstances. It is, in general, a matter of the care and competence that the recipient of the information is entitled to expect in the light of the circumstances and this will vary according to a good many factors." Restatement (second) of Torts § 552 cmt. e.

Comparative fault principles govern actions based on negligent misrepresentation, *Florenzano v. Olson*, 387 N.W.2d at 176, but not those based on deceit.

The court has accepted the tort of negligent misrepresentation, but has limited it to cases involving pecuniary loss. In *Smith v. Brutger Cos.*, 569 N.W.2d 408 (Minn. 1997), the court declined to recognize the tort of negligent misrepresentation in a personal injury case involving a claim by a tenant against a landlord for misrepresenting the security system at the apartment complex where she lived. The court had previously decided *M.H. v. Caritas Family Servs.*, 488 N.W.2d 282, 288 (Minn. 1992), in which it held that a negligent misrepresentation claim could be asserted against an adoption agency, but the court distinguished *Caritas* on the basis that it had not specifically been presented with the issue of whether negligent misrepresentation claims would be recognized in personal injury cases.

There are two primary approaches to damages in fraud and misrepresentation cases. The first approach, which is the majority approach, is the "benefit-of-the-bargain" approach. It provides for recovery of the difference between the value of the property at the time of the transaction, and the value that it would have had if the representations had been true. The second approach is the "out-of-pocket" rule. It permits recovery only of what the plaintiff has lost, not the benefit of what he was promised. *See* Dan B. Dobbs et al., The Law of Torts 2d § 690 (2011). Minnesota adheres to the "out-of-pocket" rule. *See B.F. Goodrich Co. v. Mesabi Tire Co.*, 430 N.W.2d 180, 182 (Minn. 1988); *Strouth v. Wilkison*, 302 Minn. 297, 224 N.W.2d 511 (1974); *Tysk v. Griggs*, 253 Minn. 86, 91 N.W.2d 127 (1958); *Carlson v. Burg*, 137 Minn. 53, 162 N.W. 889 (1917).

In other situations, the courts have refused to apply the out-of-pocket rule where the rule would not restore the injured party to her or his former position. *See, e.g., Lewis v. Citizens Agency of Madelia, Inc.*, 306 Minn. 194, 235 N.W.2d 831 (1975) (plaintiff relied on the representation of an insurance agent that she had a life insurance policy on her husband's life; the plaintiff could not be made whole by return of the premiums); *Brooks v. Doherty, Rumble & Butler*, 481 N.W.2d 120, 129 (Minn. Ct. App. 1992), rev. denied (Minn. April 29, 1992) (plaintiff's hiring and termination were the product of misrepresentations; out-of-pocket rule would leave loss from the fraud uncompensated); *Hughes v. Sinclair Marketing, Inc.*, 375 N.W.2d 875 (Minn. Ct. App. 1985) (in cases involving misrepresentation under the Franchise Act, the measure of damages is future lost profits).

In a claim of false representation in the sale of property the plaintiff is required to show the false representation and the resulting damages. The plaintiff is also required to prove "proximate causation between the alleged misrepresentation and the damages sought." *Bryan v. Kissoon*, 767 N.W.2d 491, 496 (Minn. Ct. App. 2009). In an "out-of-pocket" jurisdiction such as Minnesota, the plaintiff has suffered no damage if the property is worth what the plaintiff paid for it. *Id., citing Berg v. Xerxes-Southdale Office Bldg. Co.*, 290 N.W.2d 612, 615 (Minn. 1980).

CIVJIG 57.10

FRAUD AND MISREPRESENTATION

Fraud by misrepresentation must include all five of these elements:

False representation

1. (Defendant) falsely represented a past or present material fact to (plaintiff).

A fact is "material" if it would have influenced the other person's judgment or decision had (he) (she) known about it.

[The fact must be something that is knowable. This means it must be possible to discover the fact.]

Knowledge

2. At the time the false representations were made, (defendant)

    a. [Knew the representations were false]

    b. [Represented that (he) (she) knew about these facts when (he) (she) did not know if they were true or false.]

Intent

3. The false representations were made by (defendant) intending that (plaintiff) would rely on them.

Reliance

4. (Plaintiff) relied and acted on the false representations.

Harm occurred

5. (Plaintiff) was harmed as a direct result of relying on the false representations.

USE NOTE

This instruction is intended for use in cases involving intentional or reckless misrepresentations. Negligent misrepresentation is covered in CIVJIG 57.20.

AUTHORITIES

The terms "fraud" and "misrepresentation" have been used interchangeably in Minnesota law. In general terms, "fraud" is used when there is an intentional misrepresentation, whereas "misrepresentation" may be used when the misrepresentation is unintentional. Following *Florenzano v. Olson*, 387 N.W.2d 168 (Minn. 1986), it becomes important to distinguish between intentional and reckless misrepresentations and negligent misrepresentations.

There are 11 elements in a fraud or misrepresentation action. They are as follows:

1. a representation;
2. the representation must be false;
3. the representation must deal with past or present fact;
4. the fact must be material;
5. the fact must be susceptible of knowledge;
6. the representor must know the fact is false, or assert it as of his own knowledge;
7. the representor must intend to have the other person induced to act or justified in acting upon it;
8. the other person must be induced to act or justified in acting;
9. that person's actions must be in reliance upon the representation;
10. that person must suffer damages; and
11. the misrepresentation must be the proximate cause of injury.

Western Contracting Corp. v. Dow Chem. Co., 664 F.2d 1097, 1100–1101 (8th Cir. 1981); *Clements Auto. Co. v. Service Bureau Corp.*, 444 F.2d 169, 175 (8th Cir. 1971); *Hanson v. Ford Motor Co.*, 278 F.2d 586, 591 (8th Cir. 1960); *Davis v. Re-Trac Mfg. Corp.*, 276 Minn. 116, 117, 149 N.W.2d 37, 38 (1967). The courts have also noted other, more abbreviated, versions of the elements. *See Haverstock v. R.J. Wolf*, 491 F.Supp. 447, 454 (D.Minn. 1980); *Hollerman v. F.H. Peavey & Co.*, 269 Minn. 221, 228–29, 130 N.W.2d 534, 539–40 (1964); *Karlstad State Bank v. Fritsche*, 392 N.W.2d 615, 618 (Minn. Ct. App. 1986); *Hay v. Dahle*, 386 N.W.2d 808, 811 (Minn. Ct. App. 1986).

In *Specialized Tours, Inc. v. Hagen*, 392 N.W.2d 520, 532 (Minn. 1986), the supreme court reduced the fraud formulation to five elements, although the substance of the formulation is the same:

> The required elements of a fraud action are: (1) there was a false representation by a party of a past or existing material fact susceptible of knowledge; (2) made with knowledge of the falsity of the representation or made as of the party's own knowledge without knowing whether it was true or false; (3) with the intention to induce another to act in reliance thereon; (4) that the representation caused the other party to act in reliance thereon; and (5) that the party suffer pecuniary damage as a result of the reliance. *Burns v. Valene*, 298 Minn. 257, 261, 214 N.W.2d 686, 689 (1974); *Davis v. Re-Trac Manufacturing Corp.*, 276 Minn. 116, 149 N.W.2d 37 (1967).

A reckless misrepresentation occurs "when the representer asserts a fact as of his own knowledge without knowing whether it is true or false." *Florenzano v. Olson*, 387 N.W.2d 168, 177 n.2 (Minn. 1986). The misrepresentation may be written or spoken. *See Clements Auto. Co. v. Service Bureau Corp.*, 298 F.Supp. 115, 127 (D.Minn. 1969), aff'd in part and rev'd in part, 444 F.2d 169 (8th Cir. 1971). The misrepresentation may be by silence if it constitutes an affirmation of or acquiescence in what has been said. *See Watkins v. Lorenz*, 264 Minn. 471, 480, 119 N.W.2d 482, 488 (1963).

Nondisclosure may constitute fraud, but there must be a suppression of facts that one party is under a legal or equitable obligation to communicate to the other, and that the other party is entitled to have communicated to him. *See Richfield Bank & Trust Co. v. Sjogren*, 309 Minn. 362, 366, 244 N.W.2d 648, 650 (1976). *In Klein v. First Edina Nat'l Bank*, 293 Minn. 418, 421, 196 N.W.2d 619, 622 (1972), the court noted the special circumstances that may require disclosure:

> (a) One who speaks must say enough to prevent his words from misleading the other party. * * *
>
> (b) One who has special knowledge of material facts to which the other party does not have access may have a duty to disclose these facts to the other party. * * *

> (c) One who stands in a confidential or fiduciary relation to the other party to a transaction must disclose material facts. * * *

Jane Doe 43C v. Diocese of New Ulm, 787 N.W.2d 680 (Minn. Ct. App. 2010) arose out of claims made by the plaintiffs that they were abused by Father David Roney when he served as a priest in the defendant Diocese between 1965 and 1975. As part of their action, plaintiffs alleged that the defendant's act of allowing Father Roney to continue to serve as pastor at the parish and to have unsupervised access to minor children amounted to an affirmative representation that he was safe to be around children. *Id.* at 686. The court of appeals held that because nondisclosure does not give rise to a fraud claim unless there is a duty to disclose and plaintiffs had alleged no such duty, the plaintiffs had failed to establish an essential element of their intentional misrepresentation claim. *Id.* at 690.

Generally, a misrepresentation of law is not actionable. *See Northernaire Productions, Inc. v. Crow Wing County*, 309 Minn. 386, 388–89, 244 N.W.2d 279 (1976) (county officials not responsible for giving citizens incorrect zoning laws upon which they relied to their detriment). The exceptions are where the person who misrepresents the law "is learned in the field and has taken advantage of the solicited confidence of the party defrauded," and where the person who misrepresents the law "stands with reference to the person imposed upon in a fiduciary or other similar relation of trust and confidence." *Stark v. Equitable Life Assurance Soc.*, 205 Minn. 138, 143, 285 N.W. 466, 469 (1939).

The misrepresentation must be false. Truth is an absolute defense to a misrepresentation action. *See Franklin Theatre Corp. v. Minneapolis*, 293 Minn. 519, 521, 198 N.W.2d 558, 560 (1972).

The representation must have to do with a past or present fact. If, for example, there is only a prediction of future value or profits made in good faith and without a misrepresentation of fact, the statement is not actionable. *See Kennedy v. Flo-Tronics, Inc.*, 274 Minn. 327, 334, 143 N.W.2d 827, 832 (1966). Opinions are ordinarily not actionable. *See Clements Auto. Co. v. Service Bureau Corp.*, 298 F.Supp. 115, 126 (D.Minn. 1969), affirmed in part, reversed in part, 444 F.2d 169 (8th Cir. 1971).

The representation must be material. If the representation does not induce action, it is not material. *See Gaertner v. Rees*, 259 Minn. 299, 303, 107 N.W.2d 365, 368 (1961). A false representation is material if the fact untruly asserted or wrongfully suppressed had been known to the defrauded party, that knowledge would have influenced his judgment or decision. *See Lowe v. United States*, 389 F.2d 108, 111 (8th Cir. 1968), cert. denied, 392 U.S. 912, 88 S.Ct. 2072, 20 L.Ed.2d 1371 (1968).

The fact must be susceptible of knowledge. Facts are susceptible of knowledge to one who has control over or access to the object of knowledge. *Sawyer v. Tildahl*, 275 Minn. 457, 148 N.W.2d 131 (1967);

Majerus v. Guelsow, 262 Minn. 1, 113 N.W.2d 450 (1962). Facts may be susceptible of knowledge even if physical circumstances make determination of that fact burdensome and difficult. *See Control Data Corp. v. Garrison*, 305 Minn. 347, 352, 233 N.W.2d 740, 744–45 (1975).

The representer must intend the other person to be induced to act on the representation, or to be justified in acting on it. The issue is whether the representations are calculated to deceive the particular person who receives them, considering that person's mental capabilities and experience. *See Berg v. Xerxes-Southdale Office Bldg. Co.*, 290 N.W.2d 612, 616 (Minn. 1980).

The other person must be induced to act or be justified in acting, and the action must be in reliance on the representation. *Nave v. Dovolos*, 395 N.W.2d 393, 397–98 (Minn. Ct. App. 1986). In determining whether reliance was justified, various factors may be considered, including the relationship between the parties, as well as the opportunity the parties have for knowledge. *See Clements Auto. Co. v. Service Bureau Corp.*, 444 F.2d 169, 183 (8th Cir. 1971); *Hollerman v. F.H. Peavey & Co.*, 269 Minn. 221, 229, 130 N.W.2d 534, 540 (1964).

It is not necessary that the person bringing the misrepresentation action had personal contact with the person against whom suit is brought. *See Vikse v. Flaby*, 316 N.W.2d 276, 284 (Minn. 1982).

In *Martens v. Minnesota Mining & Manufacturing Co.*, 616 N.W.2d 732, 740 (Minn. 2000), the court noted that Minnesota case law "establishes a high threshold of proof" for a fraud claim:

> It must be pled with specificity that there was a false representation regarding a past or present fact, the fact was material and susceptible of knowledge, the representer knew it was false or asserted it as his or her own knowledge without knowing whether it was true or false, the representer intended to induce the claimant to act or justified in acting in reliance on the representation, the claimant suffered damages, and the representation was the proximate cause of the damages . . . .
>
> Where a representation regarding a future event is alleged . . . , an additional element of proof is that the party making the representation had no intention of performing when the promise was made:
>
> It is a well-settled rule that a representation or expectation as to future acts is not a sufficient basis to support an action for fraud merely because the represented act or event did not take place. It is true that a misrepresentation of a present intention could amount to fraud. However, it must be made affirmatively to appear that the promisor had no intention to perform at the time the promise was made.

616 N.W.2d at 747, citing *Vandeputte v. Soderholm*, 298 Minn. 505, 508, 216 N.W.2d 144, 147 (1974).

The court's discussion of fraud concerns a representation of a present intention concerning a future event. The court stated that an additional element of fraud in that case is that the person making the statement had no intention of performing at the time the promise was made. In effect, it appears to be a claim of fraud by false promise.

CIVJIG 57.15

FRAUD—REASONABLE RELIANCE

Reasonable reliance on information

> A person is negligent in relying on information provided by another person if a reasonable person would not have relied on that information.

USE NOTE

The definition of contributory negligence in reliance on a representation is a defense in fraud or misrepresentation actions, where the defendant made the representation to the plaintiff negligently or without knowledge of whether the representation was true or false. This instruction should be used in cases where the plaintiff's contributory negligence is in issue. It should not be used in cases where the claim is that the defendant knew the representations were false.

AUTHORITIES

Contributory negligence is not a defense in a case where the plaintiff's action is for deceit, i.e., a knowing misrepresentation. However, it is a defense in cases where the defendant's misrepresentation is made negligently or without knowledge of whether it is true or false. *Florenzano v. Olson*, 387 N.W.2d 168, 176 (Minn. 1986).

CIVJIG 57.20

NEGLIGENT MISREPRESENTATION

Definition of "negligent misrepresentation"

"Negligent misrepresentation" occurs when a person [in the course of his or her (business) (profession) (employment)] [during a transaction in which he or she has a financial interest]:

1. Supplies false information to another person to guide them in that person's own business transactions, and
2. Fails to use reasonable care or competence in obtaining the information or communicating it to that person, and
3. The other person relied on the information, and
4. The other person was justified in relying on that information, and
5. The other person was financially harmed by relying on the information.

"Reasonable care" is the care a reasonable person would use in the same or similar circumstances.

USE NOTE

The application of the Comparative Fault Act to negligence claims requires a clear determination of the basis for a claim of misrepresentation. Contributory negligence is a defense to a negligent misrepresentation claim, but not to a claim based on an intentional or reckless misrepresentation.

AUTHORITIES

In *Florenzano v. Olson*, 387 N.W.2d 168, 177–79 (Minn. 1986), the Minnesota Supreme Court briefly mentioned reckless misrepresentation, although the court did not expressly recognize a cause of action for reckless representations. *See Schuler v. Meschke*, 435 N.W.2d 156 (Minn. Ct. App. 1989), rev. denied (Minn. April 19, 1989). Although the majority opinion did not recognize the claim for reckless misrepresentation, a concurring opinion by Justice Simonett noted three types of actionable fraud, one of which was reckless misrepresentation. Reckless misrepresentation was defined in the concurring opinion as occurring when "the representor asserts a fact as of his own knowledge without knowing whether it is true or false." 387 N.W.2d at 177.

In *Zutz v. Case Corp.*, 422 F.3d 764, 770 (8th Cir. 2005), the Eighth Circuit, relying on *Florenzano and Williams v. Tweed*, 520 N.W.2d 515, 517 (Minn. Ct. App. 1994), rev. denied (Minn. 1994), concluded that Minnesota had recognized a claim for reckless misrepresentation.

In *Bonhiver v. Graff*, 311 Minn. 111, 122, 248 N.W.2d 291, 298–299 (1976), the supreme court held that a person making a representation is held to that standard only when "supplying information, either for the guidance of others in the course of a transaction in which one has a pecuniary interest, or in the course of one's business, profession or employment."

Bonhiver relied on a tentative draft of the Restatement (Second) of Torts § 552, which reads as follows in its current form:

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
>
> > (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
> >
> > (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.
>
> (3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

In *Noram Investment Services, Inc. v. Stirtz Bernards Boyden Surdel & Larter, P.A.*, 611 N.W.2d 372 (Minn. Ct. App. 2000), the plaintiff brought suit against the defendant accounting firm, which had issued an audit report included in a company's SEC filing and made available to the public. The plaintiff began lending margin credit to purchasers of the company's stock, holding the stock as collateral for the loan. When the American Stock Exchange stopped trading the stock due to allegations of insider trading and possible stock manipulation, the stock became worthless. The plaintiff sued the defendant accounting firm for negligent misrepresentation, claiming it had relied on the audit report in lending margin credit. The court of appeals, citing *Bonhiver v. Graff*, 311 Minn. 111, 129, 248 N.W.2d 291, 302 (1976), ruled that the plaintiff, unlike the insurance broker in *Bonhiver*, was not "clearly in the class that should be protected by the SEC's reliance." 611 N.W.2d at 375. Holding otherwise, the court opined, could lead to virtually unlimited liability.

The supreme court has not recognized the tort of negligent misrepresentation in personal injury cases. In *Smith v. Brutger Cos.*, 569 N.W.2d 408 (Minn. 1997), the court declined to recognize the tort of negligent misrepresentation in a personal injury case involving a claim by a tenant against a landlord for misrepresenting the security system at the apartment complex where she lived. The court had previously decided *M.H. v. Caritas Family Servs.*, 488 N.W.2d 282, 288 (Minn. 1992), in which it held that a negligent misrepresentation claim could be asserted against an adoption agency. However, the court distinguished *Caritas*:

> In *Caritas*, the defendant adoption agency argued that holding them liable for negligent misrepresentations would be against public policy. Id. at 286. We answered only the narrow question of whether public policy precludes "a negligent misrepresentation action against an adoption agency where the agency, having undertaken to disclose information about the child's genetic parents and medical background to the adoptive parents, negligently withholds information in such a way that the adoptive parents were misled as to the truth." Id. at 288. In answering this question, we decided solely that a negligent misrepresentation claim against an adoption agency was not barred under the specific facts of that case. Id. We did not, however, specifically adopt the tort of negligent misrepresentation in all contexts.
>
> We clearly did not adopt the specific tort of negligent misrepresentation resulting in physical harm. The plaintiffs in Caritas did not specifically allege physical harm in their complaint . . . . They did, however, allege that they had "suffered grievous [sic] mental pain and anguish." . . . Because the question before us was so narrow, we did not address the broader issue of alleged harm. We did not answer the broader question of whether negligent misrepresentation resulting in physical harm was a viable tort in Minnesota.

569 N.W.2d at 414, n.3 (citations omitted).

In general, an objective standard of reasonable care applies to those who make representations in the course of their employment. *Grueling v. Wells Fargo Home Mortgage, Inc.*, 690 N.W.2d 757, 760 (Minn. Ct. App. 2005).

In *Hebrink v. Farm Bureau Life Ins. Co.*, 664 N.W.2d 414 (Minn. Ct. App. 2003), a negligent misrepresentation claim against an insurance agent based on the agent's alleged misrepresentation as to required disclosures in a disability insurance application, the court of appeals noted that the " 'standard of care for an insurance agent is to perform at the level of skill of a reasonably prudent person in the insurance business.' " 664 N.W.2d at 420, *quoting Gabrielson v. Warnemunde*, 443 N.W.2d 540, 545 (Minn. 1989).

In *Valspar Refinish, Inc. v. Gaylord's Inc.*, 764 N.W.2d 359 (Minn. 2009), the Minnesota Supreme Court noted that it had previously recognized the tort of negligent misrepresentation in pecuniary loss cases, *see Florenzano v. Olson*, 387 N.W.2d 168, 174 (Minn. 1986); *Bonhiver v. Graff*, 311 Minn. 111, 121–22, 248 N.W.2d 291, 298–99 (1976), but that it had not previously considered the impact of M.S.A. § 604.101 on a common law tort claim for negligent misrepresentation.

M.S.A. § 604.101 "applies to any claim by a buyer against a seller for . . . a misrepresentation relating to the goods sold or leased." *Id.,* subd. 2. The statute defines a "buyer" as "a person who buys or leases or contracts to buy or lease the goods that are alleged to be . . . the subject of a misrepresentation." *Id.,* subd. 1(b). A seller is "a person who sells or leases or contracts to sell or lease the goods that are alleged to be . . . the subject of a misrepresentation." *Id.,* subd. 1(f). The statute defines "goods" as "tangible personal property, regardless of whether that property is incorporated into or becomes a component of some different property." *Id.,* subd. 1(c).

Subdivision 4 of the statute provides that "[a] buyer may not bring a common law misrepresentation claim against a seller relating to the goods sold or leased unless the misrepresentation was made intentionally or recklessly." In *Valspar Refinish* the court concluded that under M.S.A. § 604.101, subd. 4, "a buyer of goods is barred from bringing a common-law negligent misrepresentation claim against the seller that relates to the goods sold," and that "[b]ecause a common-law negligent misrepresentation claim does not require a misrepresentation to be made intentionally or recklessly, such a claim is barred by the statute." Id., 764 N.W.2d at 370.

In *Williams v. Smith*, 820 N.W.2d 807 (Minn. 2012), the supreme court considered a claim of negligent misrepresentation in connection with the negotiation of an employment contract. University of Minnesota men's basketball coach Smith and James Williams discussed the possibility of Williams becoming assistant coach at the University. Smith asked Williams if he was "ready to join him at the University of Minnesota," Williams replied he was, and later that day resigned his position at Oklahoma State University and listed his house for sale.

Ultimately, however, the University decided not to hire Williams. Williams brought a variety of claims against the University, Smith, and the athletic director, but eventually, only Williams' claim against the University and Smith for negligent misrepresentation went to trial. The jury found for Williams and awarded him damages of $1,247,293, which the district court later reduced to $1 million. The supreme court concluded, however, that "when a prospective government employment relationship is negotiated at arm's length between sophisticated business persons who do not have a professional, fiduciary, or other special legal relationship, the prospective employee is not entitled to protection against negligent misrepresentations by the representative for the prospective government employer." *Williams v. Smith*, 820 N.W.2d 807, 809 (Minn. 2012).

CIVJIG 57.25

FRAUD AND MISREPRESENTATION—DAMAGES

Deciding damages for fraud and misrepresentation

In deciding damages, decide the amount of money that will fairly and adequately compensate (plaintiff) for the damages directly caused by relying on (defendant's) misrepresentation.

Damages for fraud or misrepresentation are limited to:

1. The difference between the actual value of the property received and the price paid for it, and
2. Any other damages that were directly caused by relying on the fraud or misrepresentation.

USE NOTE

This instruction covers damages in fraud and misrepresentation cases. Minnesota typically adheres to the "out-of-pocket" approach to calculate damages. That is the standard incorporated in this jury instruction. There are exceptions to the rule, however, and the instruction would have to be modified accordingly in a case where an exception to the usual rule arises.

AUTHORITIES

There are two major approaches to damages in fraud cases. The first, the majority approach, is the "benefit-of-the-bargain" approach, which provides for recovery of the difference between the value of the property at the time of the transaction, and the value that it would have had if the representations had been true. The second approach, the "out-of-pocket" rule, permits recovery only of what the plaintiff has lost, not the benefit of what he was promised. *See* Dan B. Dobbs et al., The Law of Torts 2d § 690 (2011). Minnesota adheres to the "out-of-pocket" rule. *See Strouth v. Wilkison*, 302 Minn. 297, 299, 224 N.W.2d 511, 513 (1974); *Tysk v. Griggs*, 253 Minn. 86, 94, 91 N.W.2d 127, 134 (1958); *Carlson v. Burg*, 137 Minn. 53, 55, 162 N.W. 889, 890 (1917). The out-of-pocket loss in the usual case is the difference between the actual value of the property received, and the price paid for it, together with such other or special damages as were naturally and proximately caused by the fraud prior to discovery of the fraud. *Strouth v. Wilkison*, 302 Minn. 297, 300, 224 N.W.2d 511, 514 (1974); *Tysk v. Griggs*, 253 Minn. 86, 95, 91 N.W.2d 127, 134 (1958); Prosser and Keeton on the Law of Torts § 110.

The out-of-pocket rule "works best in a transactional context of 'the purchaser in buying property in reliance upon the fraudulent representation of the seller.' " *B.F. Goodrich Co. v. Mesabi Tire Co.*, 430 N.W.2d 180, 183 (Minn. 1988), quoting *Lowrey v. Dingmann*, 251 Minn. 124, 127, 86 N.W.2d 499, 501 (1957). The court said that

> [T]he rule works well where the plaintiff has received property in reliance on the misrepresentation, as in sales of goods or real estate, and the property received serves as the reference point for measuring the damages. The rule works less well where . . . defendant's misrepresentation prevents plaintiff from taking measures to protect the value of property it already has.

B.F. Goodrich Co. v. Mesabi Tire Co., 430 N.W.2d 180, 183 (Minn. 1988).

In other situations, the court has also refused to apply the out-of-pocket rule where the rule would not restore the injured party to her or his former position. *See, e.g., Lewis v. Citizens Agency of Madelia, Inc.*, 306 Minn. 194, 235 N.W.2d 831 (1975) (plaintiff relied on the representation of an insurance agent that she had a life insurance policy on her husband's life; the plaintiff could not be made whole by return of the premiums); *Brooks v. Doherty, Rumble & Butler*, 481 N.W.2d 120, 129 (Minn. Ct. App. 1992), rev. denied (Minn. April 29, 1992) (plaintiff's hiring and termination were the product of misrepresentations; out-of-pocket rule would leave loss from the fraud uncompensated); *Hughes v. Sinclair Marketing, Inc.*, 375 N.W.2d 875, 879 (Minn. Ct. App. 1985) (in cases involving misrepresentation under the Franchise Act, the measure of damages is future lost profits).

"Where the out-of-pocket rule does not apply, the plaintiff may recover for any injury which is the direct and natural consequence of having acted on the faith of defendant's representations." *Hanks v. Hubbard Broadcasting, Inc.*, 493 N.W.2d 302, 310 (Minn. Ct. App. 1992), rev. denied (Minn. Feb. 12, 1993), *citing Lewis v. Citizens Agency of Madelia, Inc.*, 306 Minn. 194, 199, 235 N.W.2d 831, 835 (1975).

In *Nave v. Dovolos*, 395 N.W.2d 393, 398, n. 1 (Minn. Ct. App. 1986), the court considered the measure of damages for misrepresentation in the sale of a house:

> When, as here, the purchaser claims that the seller's fraudulent misrepresentation induced the formation of a contract but the purchaser does not seek return of the property, Minnesota adheres to the "out-of-pocket rule," which measures damages as the difference between what the defrauded party paid and what he or she actually received, together with other damages proximately caused by the fraud. *Johnson Building Co. v. River Bluff Development Co.*,

374 N.W.2d 187, 195 (Minn. Ct. App. 1985); *Yost v. Millhouse,* 373 N.W.2d 826, 830, 830–31 (Minn. Ct. App. 1985). More precisely, in cases involving a fraudulent misrepresentation to a buyer of real estate, the measure of damages is the amount paid less the fair market value of the property. *Peterson v. Johnston,* 254 N.W.2d 360, 362 (Minn. 1977); *Tysk v. Griggs,* 253 Minn. 86, 91 N.W.2d 127 (1958).

In a claim of false representation in the sale of property, the plaintiff is required to show the false representation and the resulting damages. *Bryan v. Kissoon*, 767 N.W.2d 491, 496 (Minn. Ct. App. 2009). In a case involving fraudulent misrepresentation in a real estate transaction, repair costs alone are insufficient to establish damages. *Id*.

CIVJIG 57.30

DUTY TO DISCLOSE MATERIAL FACTS

Duty to disclose material facts

There is no duty to disclose material facts to another person. However:

[a. A person who speaks must say enough to prevent his or her words from misleading the other person]

[b. A person who has special knowledge of material facts that the other person is unable to get has a duty to disclose these facts]

[c. A person who stands in a confidential or fiduciary relationship has a duty to disclose material facts].

Fiduciary relationship

[A "fiduciary relationship" exists when one person places confidence in another person who, as a result of having this confidence placed in him or her, assumes a position of superiority and influence.

The relationship may be legal, moral, social, domestic, or merely personal.]

USE NOTE

There is ordinarily no duty to affirmatively disclose information. However, there may be a misrepresentation by silence in a limited category of cases where the defendant has an obligation to come forward with information.

AUTHORITIES

Nondisclosure may constitute fraud, but there must be a suppression of facts that one party is under a legal or equitable obligation to communicate to the other, and that the other party is entitled to have communicated to him. *See Richfield Bank & Trust Co. v. Sjogren*, 309

Minn. 362, 365–66, 244 N.W.2d 648, 650 (1976). In *Klein v. First Edina Nat'l Bank*, 293 Minn. 418, 421, 196 N.W.2d 619, 622 (1972), the court noted the special circumstances that may require disclosure:

> (a) One who speaks must say enough to prevent his words from misleading the other party. * * *
>
> (b) One who has special knowledge of material facts to which the other party does not have access may have a duty to disclose these facts to the other party. * * *
>
> (c) One who stands in a confidential or fiduciary relation to the other party to a transaction must disclose material facts. * * *

CIVJIG 57.40

CONSUMER FRAUD

Definition of "consumer fraud"

"Consumer fraud" occurs when a (person) (corporation) (business) in the course of selling (goods) (services):

1. Uses (false information) (a deceptive practice), and
2. Intends that others would rely on this (false information) (deceptive practice).

Recovery for consumer fraud

(Plaintiff) may recover damages for consumer fraud, if:

1. [(Plaintiff) relied and acted on the (false information) (deceptive practice); and,]

   [The (false information) (deceptive practice) had a substantial part in bringing about (plaintiff's) injury; and,]

2. The (false information) (deceptive practice) harmed (plaintiff).

USE NOTE

CIVJIG 57.40 sets out two alternatives for instructing on the causation issue. The first states that the plaintiff must have "relied and acted" on the false information. This language is adapted from CIVJIG 57.10, Fraud and Misrepresentation, and is appropriate for cases in which the trial court has determined proof of actual reliance will be required. The second alternative states that the alleged fraud must have had a "substantial part" in bringing about the plaintiff's injury. The suggested language is adapted from CIVJIG 27.10, Direct Cause, and may be appropriate for cases in which a showing of actual reliance is not required, but the plaintiff may recover upon a showing of a "nexus" between the alleged fraud and plaintiff's injury. As discussed below, Minnesota law does not define "legal nexus" or "causal nexus."

A plaintiff may not need to prove reliance on the false statement or deceptive practice to establish a cause of action for violation of the Consumer Fraud Act, M.S.A. § 325F.69. In *Group Health Plan, Inc. v. Philip Morris Inc.*, 621 N.W.2d 2 (Minn. 2001), The Minnesota supreme court considered claims of consumer fraud made by health maintenance organizations (HMOs) against the tobacco industry. The court stated:

> While we conclude that causation is a necessary element in a damages claim under the misrepresentation in sales statutes, in light of the reality that the root cause of the HMOs' claimed damages is their members' smoking-related injuries allegedly caused by the misconduct of the tobacco companies and the statutory authorization to "any person injured by a violation" to bring an action, we do not interpret the language of [Minn.Stat. § 8.31] subdivision 3a to require a strict showing of direct causation, as would be required at common law. Rather, as the court of appeals has expressed it, the statute requires that there must be some "legal nexus" between the injury and the defendants' wrongful conduct.

Group Health, 621 N.W.2d at 14. The court reasoned:

> To impose a requirement of proof of individual reliance in the guise of causation would reinstate the strict common law reliance standard that we have concluded the legislature meant to lower for these statutory actions. Moreover, we are confident that the legislature would not have authorized private damages actions such as this, where the alleged misrepresentations are claimed to have affected a large number of consumers, while retaining a strict burden of proof that depends on evidence of individual consumer reliance.

621 N.W.2d at 14. Whether the causal nexus between the alleged fraud and the plaintiff's injuries need be shown by evidence of reliance will depend on the nature of the case:

> To reiterate, in order to prove their claims for damages under the misrepresentation in sales statutes, the HMOs must establish a causal nexus between their alleged damages and the conduct of the defendants alleged to violate the statutes. This causal nexus has a component of reliance that, in this type of case before the court, may be proven by means other than direct evidence of reliance by individual consumers.

621 N.W.2d at 15. The court suggested that the requirements of proof to establish a claim under the Lanham Act, 15 U.S.C. § 1125(a), might provide useful guidance. In particular, the court noted that a plaintiff asserting a deceptive advertising claim under the Lanham Act need not demonstrate actual consumer confusion, but need only prove the likelihood of confusion. *Group Health*, 621 N.W.2d at 15 n. 11, citing *LensCrafters, Inc. v. Vision World, Inc.*, 943 F.Supp. 1481, 1489–90 (D.Minn. 1996).

AUTHORITIES

Conduct that constitutes consumer fraud may be enjoined. Minnesota's Consumer Fraud Act, M.S.A. § 325F.69, provides in part:

> The act, use, or employment by any person of any fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice, with the intent that others rely thereon in connection with the sale of any merchandise, whether or not any person has in fact been misled, deceived, or damaged thereby, is enjoinable as provided herein.

The legislature intended that the Consumer Fraud Act (CFA) would create a remedy broader than that available in an action for common law fraud, and the Minnesota Supreme Court has repeatedly stated that the provisions of the Consumer Fraud Act (CFA) are meant to be construed broadly:

> . . . the legislative history clearly indicates that the CFA was intended to protect a broad, though not limitless, range of individuals from fraudulent and deceptive trade practices, and our decisions have also recognized the breadth of its coverage.

Ly v. Nystrom, 615 N.W.2d 302, 310 (Minn. 2000). *See also Group Health Plan, Inc. v. Philip Morris Inc.*, 621 N.W.2d 2, 4 (Minn. 2001).

Availability of a Private Right of Action

The CFA itself provides that fraudulent practices may be enjoined; the statute itself does not provide a separate remedy for damages. M.S.A. § 325F.70. A private plaintiff seeking compensatory damages must rely, instead, on the Private Attorney General statute, MS.A. § 8.31 subd. 3a provides that:

> . . . any person injured by a violation of any of the laws referred to in section 1 [expressly including the CFA] may bring a civil action and recover damages, together with costs and disbursements, including costs of investigation and reasonable attorney's fee, and receive other equitable relief as determined by the court.

So, in *Church of the Nativity of Our Lord v. WatPro, Inc.*, 491 N.W.2d 1, 9 (Minn. 1992), the court concluded that the plaintiff church, having demonstrated a violation of the CFA, had a right to recover its attorney fees pursuant to M.S.A. § 8.31, subd. 3a. If no attorney's fees were awarded, the court noted, the church would have spent virtually all of its damage award paying its attorneys. The court concluded that "[t]he private attorney general statute was intended to cover just this type of case." 491 N.W.2d at 8.

In *Ly v. Nystrom*, 615 N.W.2d 302 (2002), however, the court narrowed the availability of a private right of action for violation of the

CFA. The court concluded "that the legislature could not have intended to sweep every private dispute based on fraud, and falling within the CFA, into a statute where attorney fees and additional costs and expenses would be awarded, because to do so would substantially alter a fundamental principle of law deeply ingrained in our common law jurisprudence—that each party bears his own attorney fees in the absence of a statutory or contractual exception." *Ly*, 615 N.W.2d at 314. The court held that the Private Attorney General statute "applies only to those claimants who demonstrate that their cause of action benefits the public." *Ly*, at 314. The court observed that the plaintiff in that case was defrauded in a single one-on-one transaction in which the fraudulent misrepresentation was made only to the plaintiff. Consequently, the court ruled, the plaintiff's successful prosecution of his fraud claim did not advance state interests and had no public benefit, and thus was not the type of claim "that could be considered to be within the duties and responsibilities of the attorney general to investigate and enjoin." *Ly*, at 315. To the extent the decision in *Church of the Nativity of Our Lord v. WatPro, Inc.*, 491 N.W.2d 1, could be construed to permit recovery absent a showing of public benefit, that decision was overruled. *Ly*, at n. 25. *See also Group Health*, 621 N.W.2d at 11, n. 7.

In *Ly v. Nystrom*, the court concluded that the plaintiff's claim lacked sufficient public benefit because the fraudulent misrepresentation occurred in a one-on-one transaction and was made only to the plaintiff. 615 N.W.2d at 314. In the course of its decision, the court gives some guidance as to other factors that might be considered in determining whether a particular cause of action had public benefit: have the legal services benefited a class of persons, not just the particular litigant, 615 N.W.2d at 312 n. 18, citing *Martin v. Hancock*, 466 F.Supp. 454 (D.Minn. 1979); does the alleged conduct implicate consumer protection concerns, 615 N.W.2d at 312 n.18, *citing Brody v. Finch Univ. of Health Sciences*, 298 Ill.App.3d 146, 232 Ill.Dec. 419, 430–31, 698 N.E.2d 257, 268–69 (1998); and whether the fruits of a successful investigation would be available to others and the attorney general, 615 N.W.2d at 314 n. 24.

Other Minnesota courts have touched upon the need for a plaintiff to demonstrate a public benefit in order to recover attorney's fees pursuant to M.S.A. § 8.31. *See, e.g., Liess v. Lindemyer*, 354 N.W.2d 556, 558 (Minn. Ct. App. 1984). Few decisions, however, analyze what constitutes a public benefit. In *Kamrath v. Suburban National Bank*, 363 N.W.2d 108, 112 (Minn. Ct. App. 1985), the court upheld a fee award pursuant to the Private Attorney General statute in litigation involving an employer's wrongful demand that an employee submit to a polygraph test. The court concluded that the legislature and the supreme court had shown a strong public interest in barring employer requests for polygraph tests:

> Among stated concerns were encouraging a harmonious atmosphere in employer-employee relations, protecting employees' expectations of privacy, discouraging practices which may demean an individ-

> ual's dignity, protect employees from adverse inferences should they refuse the test, and avoid "the coercive impact present in the solicitation."

Kamrath, 363 N.W.2d at 111, quoting, in part, *State v. Century Camera*, 309 N.W.2d 735, 743 (Minn. 1981).

In *Collins v. Minnesota School of Business, Inc.*, 655 N.W.2d 320 (Minn. 2003), the supreme court elaborated on the types of factors that determine whether a private claim is of benefit to the public, when it considered the availability of attorney's fees under the Private Attorney General statute. The plaintiffs in *Collins* brought a number of claims alleging the defendant made false and misleading statements about its sports medicine program. Relying on the supreme court's holding in *Ly v. Nystrom*, the district court denied attorney's fees on the grounds that the plaintiffs' claims did not benefit the public because the group of persons allegedly harmed by the defendant's misrepresentations was a "relatively small group." In *Collins*, the supreme court held the defendant had "presented its program to the public at large," however, and made note of a number of factors indicating that the plaintiffs' claims "benefited the public." The defendant offered its programs to the public at large; the defendant was licensed by the Minnesota Higher Education Service Office (HESO) and sought approval from HESO before changing the program curriculum and name; when it launched the program, the defendant made misrepresentations to the public at large by airing a television advertisement; and finally, the defendant made numerous sales and information presentations. *Collins*, 655 N.W.2d at 330.

Standing to Bring an Action

A plaintiff may have standing to allege a violation of the CFA even if that plaintiff is not a purchaser of the defendant's goods or services. In *State of Minnesota by Humphrey v. Philip Morris Inc.*, 551 N.W.2d 490 (Minn. 1996), the court held that the statutory language referring to "any person" gave plaintiff Blue Cross standing to sue under various consumer protection theories, including violation of the *CFA. In Group Health Plan, Inc. v. Philip Morris Inc.*, 621 N.W.2d 2, 4 (Minn. 2001), answering certified questions from a federal trial court, the supreme court expressly ruled that, as long as a plaintiff alleges conduct that violates the CFA, it is not necessary under the Private Attorney General statute for that plaintiff to plead that it is a purchaser of the defendant's products. Group Health, 621 N.W.2d at 11.

A purchaser may have standing to bring suit even if the purchaser is a business or non-profit corporation and not simply an individual consumer. In *Church of the Nativity of Our Lord v. WatPro, Inc.*, 491 N.W.2d 1 (Minn. 1992), the court held that the plaintiff church's purchase of roofing was an ordinary consumer transaction that fell within the purview of the CFA.

In *Toth v. Arason*, 722 N.W.2d 437 (Minn. 2006), when plaintiff

Toth learned that the defendant had installed a non-OEM radiator and condenser in his truck, plaintiff alleged the defendant had violated M.S.A. § 326F.60, the Truth in Repairs Act, and brought a private cause of action for this violation under § 325F.63. M.S.A. § 325F.64 provides that certain portions of the Consumer Fraud Act, including § 325F.63, shall not apply if an insurer pays the costs of the repairs in question. The court held that by operation of the plain language of § 325F.64, the remedy section of the Truth in Repairs Act, § 325F.63, did not apply and, consequently, plaintiff could not assert a private cause of action for damages and attorney's fees under M.S.A. § 8.31, subd. 3(a).

Nature of the Transaction

The CFA is applicable to a broad range of transactions, including many that might not normally be thought of as consumer transactions. In 1997, the legislature amended the definition of "merchandise" to include bank loans. M.S.A. § 325F.68, subd. 2 now defines "merchandise" to mean "any objects, wares, goods, commodities, intangibles, real estate, loans, or services." A wide variety of transactions have been found to raise potential claims under the CFA. *See, e.g., Church of the Nativity of Our Lord v. WatPro, Inc.*, 491 N.W.2d 1 (Minn. 1992) (A church's purchase of roofing materials.); *K.A.C. v. Benson*, 527 N.W.2d 553, 561 (Minn. 1995) (A patient's employment of a physician's services, though the claim was dismissed because plaintiff was unable to establish an injury.); *Alsides v. Brown Institute, Ltd.*, 592 N.W.2d 468 (Minn. Ct. App. 1999) (A student's purchase of proprietary trade-school instruction.); and, *Wexler v. Brothers Entertainment Group, Inc.*, 457 N.W.2d 218 (Minn. Ct. App. 1990) (Child's participation in a telephone trivia game.).

In *Ly v. Nystrom*, 615 N.W.2d 302 (Minn. 2000), the plaintiff purchased a restaurant from the defendant and later alleged that the seller had fraudulently misrepresented, among other things, the value of the inventory and the monthly revenue. The court characterized the purchaser as "more that of a consumer of the restaurant business than a buyer of a business for resale," *Ly*, 615 N.W.2d at 310. As such, the court held that "the unlawful practices here, occurring while engaging in a one-on-one transaction for the purchase of a business for operation and not resale, fall within the trade practices prohibited section 325F.69, subdivision 1." *Ly*, 615 N.W.2d at 310.

SPECIAL VERDICT FORMS

CIVSVF 57.90

FRAUD

1. Did (defendant) falsely represent (a) past or present material fact(s) to (plaintiff)?

____
Yes or No

2. *If your answer to Question 1 was "Yes," then answer this question*: At the time the false representation(s) (was) (were) made, did (defendant) know the representation(s) (was) (were) false?

____
Yes or No

3. *If your answer to Question 2 was "No," then answer this question*: Did (defendant) represent that (he) (she) knew about (this) (these) fact(s) when (he) (she) did not know if (it) (they) (was) (were) true or false?

____
Yes or No

4. *If your answer to either Question 2 or 3 was "Yes," then answer this question*: Did (defendant) intend that (plaintiff) would rely on the false representation(s)?

____
Yes or No

5. *If your answer to Question 4 was "Yes," then answer this question*: Did (plaintiff) rely on the false representation(s)?

____
Yes or No

6. *If your answer to Question 5 was "Yes," then answer this question*: Was (plaintiff) justified in relying on the false representation(s)?

____
Yes or No

7. *If your answer to Question 6 was "Yes," then answer this question*: Was (plaintiff) harmed as a direct result of relying on the false representation(s)?

____
Yes or No

8. *If your answer to Question 7 was "Yes," then answer this question*: Was (plaintiff) negligent in relying on the false representation(s)?

____
Yes or No

[If your answer to Question 3 and Question 7 was "Yes" and your answer to Question 8 was also "Yes," then answer Question 9.]

9. Taking all of the fault that contributed as a direct cause of (plaintiff)'s damages to be 100%, what percentage do you attribute to:

(defendant) ________%

(plaintiff) ________%

TOTAL 100%

10. *If your answer to Question 7 was "Yes," then answer this question*: What amount of money will fairly and adequately compensate (plaintiff) for the damages (he) (she) experienced as a direct result of relying on the false representation(s)?

$________

USE NOTE

This special verdict form is structured to require a comparison of fault only if a jury finds that the defendant's misrepresentation was reckless and the plaintiff was negligent in relying on that misrepresentation. *See Florenzano v. Olson*, 387 N.W.2d 168, 177–78 (Minn. 1986) (Simonett, J., concurring specially). It does not permit comparison of fault where the defendant's misrepresentation was intentional.

The questions in this special verdict form correspond with the following jury instructions:

1. CIVJIG 57.10: Fraud and Misrepresentation, False representation.
2. CIVJIG 57.10: Fraud and Misrepresentation, Knowledge.
3. CIVJIG 57.10: Fraud and Misrepresentation, Knowledge.

4. CIVJIG 57.10: Fraud and Misrepresentation, Intent.
5. CIVJIG 57.10: Fraud and Misrepresentation, Reliance.
6. CIVJIG 57.15: Fraud—Reasonable Reliance.
7. CIVJIG 57.10: Fraud and Misrepresentation, Harm Occurred.
8. CIVJIG 25.10: Negligence and Reasonable Care.
9. CIVJIG 28.15: Comparative Fault.
10. CIVJIG 57.25: Fraud and Misrepresentation—Damages.

CIVSVF 57.91

NEGLIGENT MISREPRESENTATION

1. Did (defendant) provide false information to (plaintiff)?

____
Yes or No

2. *If your answer to Question 1 was "Yes," then answer this question*: Did (defendant) fail to use reasonable care or competence in obtaining the information or communicating it to (plaintiff)?

____
Yes or No

3. *If your answer to Question 1 was "Yes," then answer this question*: Did (plaintiff) rely on the information provided by (defendant)?

____
Yes or No

4. *If your answer to Question 3 was "Yes," then answer this question*: Was (plaintiff) justified in relying on the information provided by (defendant)?

____
Yes or No

5. *If your answer to Question 4 was "Yes," then answer this question*: Was (plaintiff) negligent in relying on the misrepresentation?

____
Yes or No

6. *If your answer to Question 4 was "Yes," then answer this question*: Was (plaintiff) harmed as a direct result of relying on the false representation?

____
Yes or No

[If your answers to Questions 2 and 5 were "Yes," and you also answered "Yes" to Question 6, then answer Question 7.]

7. Taking all of the fault that contributed as a direct cause of (plaintiff)'s damages to be 100%, what percentage do you attribute to:

(defendant) ________%

(plaintiff) _______%

TOTAL 100%

8. *If your answer to Question 6 was "Yes," then answer this question*: What amount of money will fairly and adequately compensate (plaintiff) for the damages caused by relying on the misrepresentation?

$_______

USE NOTE

The questions in this special verdict form correspond with the following jury instructions:

1. CIVJIG 57.20: Negligent Misrepresentation.
2. CIVJIG 57.20: Negligent Misrepresentation.
3. CIVJIG 57.20: Negligent Misrepresentation.
4. CIVJIG 57.20: Negligent Misrepresentation.
5. CIVJIG 25.10: Negligence and Reasonable Care.
6. CIVJIG 57.25: Fraud and Misrepresentation—Damages.
7. CIVJIG 28.15: Comparative Fault.
8. CIVJIG 57.25: Fraud and Misrepresentation—Damages.

CIVSVF 57.92

CONSUMER FRAUD

1. Did (defendant) (provide false information) (use a deceptive practice) in the course of selling (goods) (services)?

____
Yes or No

2. *If your answer to Question 1 was "Yes," then answer this question*: Did (defendant) intend that others would rely on the (false information) (deceptive practice)?

____
Yes or No

3. *If your answer to Question 2 was "Yes," then answer this question*: Was (plaintiff) harmed as a direct result of [relying and acting on] the (false information) (deceptive practice)?

____
Yes or No

4. *If your answer to Question 3 was "Yes," then answer this question:* Was (plaintiff) negligent?

____
Yes or No

5. *If your answer to Question 4 was "Yes," then answer this question:* Was (plaintiff's) negligence a direct cause of (plaintiff's) damages?

____
Yes or No

[If your answers to Questions 2 and 3 were "Yes," and you also answered "Yes" to Question 5, then answer Question 6.]

6. Taking all of the fault that contributed as a direct cause of (plaintiff's) damages to be 100%, what percentage do you attribute to:
(defendant) ________%
(plaintiff) ________%
TOTAL 100%

7. *If your answer to Question 3 was "Yes," then answer this question*: What amount of money will fairly and adequately compensate (plaintiff) for the damages caused by the (false information) (deceptive practice)?

$________

USE NOTE

Question 3 on CIVSVF 57.92 contains bracketed language concerning the plaintiff's reliance. This language should be deleted should the trial court decide that the plaintiff, in a particular cause of action pursuant to the Consumer Fraud Act, need not prove reliance, but only need prove a legal nexus between the alleged act and the damages. For a more complete discussion of this issue, *see* Use Note, CIVJIG 57.40. Question 4, concerning plaintiff's negligence, can be modified to ask about negligent reliance, tracking the approach used in CIVSVF 57.91, if appropriate to do so.

The questions in this special verdict form correspond with the following jury instructions:

1. CIVJIG 57.40: Consumer Fraud.
2. CIVJIG 57.40: Consumer Fraud.
3. CIVJIG 57.40: Consumer Fraud.
4. CIVJIG 57.40: Consumer Fraud.
5. CIVJIG 25.10: Negligence and Reasonable Care.
6. CIVJIG 28.15: Comparative Fault.
7. CIVJIG 90.20: Compensatory Damages—Personal and Property Damages—General Instruction.

Unlike a plaintiff asserting a common law claim for fraud or misrepresentation, a plaintiff asserting a claim pursuant to the Consumer Fraud Act and Private Attorney General statute is not necessarily limited to out-of-pocket damages. Question 7 should be modified depending on the nature of damages alleged.

CATEGORY 59

INSURANCE

Table of Instructions

CIVJIG 59.10 Insurance policy coverage burden of proof
CIVJIG 59.15 Insurance policy exclusion burden of proof
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SPECIAL VERDICT FORMS

CIVSVF 59.90 Misrepresentation—Application for insurance

INTRODUCTORY NOTE

Contents

The instructions in this category cover certain recurring issues in insurance law. CIVJIG 59.10, 59.15, and 59.20 cover the burden of proof in cases where coverage, exclusions from coverage, and exceptions to exclusions are in issue. CIVJIG 59.25 covers cases where an applicant for insurance has intentionally misrepresented certain material facts or those facts materially increased the risk to the insurer. CIVJIG 59.30 covers intentional injury exclusions. No instruction is recommended, however, because of the variance in policy language that may be in issue in a given case. CIVJIG 59.35 covers an insurer's good faith duty to settle, although in those cases the Committee does not recommend a specific instruction because the exact shape of Minnesota law on the issue is not clear. CIVJIG 59.40 covers cases where there is a fact issue concerning whether an insurance professional is an insurance agent or insurance broker.

General Principles of Construction

The interpretation of an insurance policy and statutory construction are questions of law for the court. *Travelers Indem. Co. v. Bloomington Steel & Supply Co.*, 718 N.W.2d 888, 894 (Minn. 2006); *Nathe*

Bros., Inc. v. American Nat. Fire Ins. Co., 615 N.W.2d 341, 344 (Minn. 2000). General contract principles govern the construction of insurance policies. *Thommes v. Milwaukee Ins. Co.*, 641 N.W.2d 877, 879 (Minn. 2002); *Nathe Bros., Inc. v. American Nat. Fire Ins. Co.*, 615 N.W.2d 341, 344 (Minn. 2000); *Dairyland Ins. Co. v. Implement Dealers Ins. Co.*, 294 Minn. 236, 244–45, 199 N.W.2d 806, 811 (1972).

The goal of the rules of construction is to arrive at an interpretation of the insurance contract that is consistent with the intent of the parties. *Thommes v. Milwaukee Ins. Co.*, 641 N.W.2d 877, 879 (Minn. 2002); *Minnesota Min. and Mfg. Co. v. Travelers Indem. Co.*, 457 N.W.2d 175, 179 (Minn. 1990); *Canadian Universal Ins. Co., Ltd. v. Fire Watch, Inc.*, 258 N.W.2d 570, 572 (Minn. 1977).

The policy must be construed as a whole and unambiguous language must be given its plain and ordinary meaning. *Thommes v. Milwaukee Ins. Co.*, 641 N.W.2d 877, 880 (Minn. 2002); *Medica, Inc. v. Atlantic Mut. Ins. Co.*, 566 N.W.2d 74, 77 (Minn. 1997). The terms of an insurance policy should be construed according to what a reasonable person in the position of the insured would have understood the words to mean rather than what the insurer intended the language to mean. *Canadian Universal Ins. Co., Ltd. v. Fire Watch, Inc.*, 258 N.W.2d 570, 572 (Minn. 1977).

An ambiguity exists when a word or phrase in an insurance contract is reasonably susceptible of more than one construction. *Minnesota Min. and Mfg. Co. v. Travelers Indem. Co.*, 457 N.W.2d 175, 179 (Minn. 1990). Whether an ambiguity exists is determined from the viewpoint of a layperson, not a lawyer; when reasonably intelligent policy holders could differ as to the meaning of a given term, the language is ambiguous. *Northwest Airlines, Inc. v. Globe Indem. Co.*, 303 Minn. 16, 26, 225 N.W.2d 831, 837 (1975).

If a policy is ambiguous, extrinsic evidence is admissible, not to vary or modify the policy's terms, but to aid in ascertaining the parties" mutual intent at the time of contracting. *Holm v. Mutual Service Cas. Ins. Co.*, 261 N.W.2d 598, 600 (Minn. 1977); *State Auto. & Cas. Underwriters v. Casualty Underwriters, Inc.*, 266 Minn. 536, 538, 124 N.W.2d 185, 187 (1963).

In appropriate cases, the doctrine of reasonable expectations can be used to determine the intent of the parties, but, because the doctrine requires the insured to prove the expectations were objectively reasonable, a jury issue is presented. *Atwater Creamery Co. v. Western Nat. Mut. Ins. Co.*, 366 N.W.2d 271, 278 (Minn. 1985).

Policy ambiguities are generally construed in favor of the insured. *Travelers Indem. Co. v. Bloomington Steel & Supply Co.*, 718 N.W.2d 888, 894 (Minn. 2006); *Nathe Bros., Inc. v. American Nat. Fire Ins. Co.*, 615 N.W.2d 341, 344 (Minn. 2000); *Atwater Creamery Co. v. Western Nat. Mut. Ins. Co.*, 366 N.W.2d 271, 277 (Minn. 1985). Statutorily required provisions in insurance policies will not necessarily be construed against insurers, however. *Laidlaw v. Commercial Ins. Co. of Newark*, 255 N.W.2d 807, 811 (Minn. 1977).

Exclusions contained in an insurance policy are as much a part of the insurance contract as any other part, and must be given the same consideration in determining what the policy covers. *Thommes v. Milwaukee Ins. Co.*, 641 N.W.2d 877, 880 (Minn. 2002). Exclusionary provisions in an insurance policy are strictly construed against insurers. *Travelers Indem. Co. v. Bloomington Steel & Supply Co.*, 718 N.W.2d 888, 894 (Minn. 2006); *Thommes v. Milwaukee Ins. Co.*, 641 N.W.2d 877, 880 (Minn. 2002); *American Family Ins. Co. v. Walser*, 628 N.W.2d 605, 613 (Minn. 2001); *SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d 305, 314 (Minn. 1995).

If an insurance policy provision conflicts with an applicable statute, the statute controls. *E.g., Watson v. United Services Auto. Ass'n*, 566 N.W.2d 683, 689 (Minn. 1997) (fire insurance); *Iverson v. State Farm Mut. Auto. Ins. Co.*, 295 N.W.2d 573, 574 (Minn. 1980) (no-fault act).

CIVJIG 59.10

INSURANCE POLICY COVERAGE BURDEN OF PROOF

Policy coverage—burden of proof

> [Name of insured] claims that [he/she/it] is entitled to coverage under a policy of [kind of insurance] issued by [name of insurer]. [Name of insured] must prove by a preponderance of the evidence that [his/her/its] [claim/loss/damage/injury/liability] is covered by the policy, and must also prove the amount of damages for which coverage exists.

USE NOTE

This instruction is applicable to both first-party and third party insurance policy claims. For first-party claims, the instruction should be given using one of the following terms: claim, loss, damage, or injury. For third-party claims, the instruction should given using either claim or liability. As noted below, this rule applies to others who may claim benefits under an insurance policy. In those cases, this instruction should be modified accordingly.

AUTHORITIES

The issue of burden of proof arises frequently in insurance coverage litigation. Most of the authorities arise in the context of liability insurance, but there is nothing in Minnesota jurisprudence to suggest that the principles developed on the burden of proof issue should not be applied to all forms of insurance, including property, liability, health, professional liability, and life.

The leading Minnesota case deciding the burden of proof issue is *SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d 305 (Minn. 1995). In deciding what burden the insured has, the court stated:

> In an action to determine coverage, the initial burden of proof is on the insured to establish a prima facie case of coverage. *Boedigheimer v. Taylor*, 287 Minn. 323, 329, 178 N.W.2d 610, 614 (1970). What constitutes a prima facie showing of coverage depends on the language of the particular policy. The policy must be read as a whole, and unambiguous language must be accorded its plain and ordinary meaning. *Henning Nelson Constr. Co. v. Fireman's Fund Am. Life Ins. Co.*, 383 N.W.2d 645, 652 (Minn.1986).

SCSC Corp., 536 N.W.2d at 311. *See also Travelers Indem. Co. v. Bloomington Steel & Supply Co.*, 718 N.W.2d 888, 894 (Minn. 2006).

Other decisions have applied this principle. For example, in *Northern States Power Co. v. Fidelity and Cas. Co. of New York*, 523 N.W.2d 657 (Minn. 1994), the supreme court made clear that it is the insured's burden to prove the amount of damage covered by the policy: ". . . the insured bears the burden of proving the total amount of damages for which coverage may exist." *Northern States Power Co.*, 523 N.W.2d at 664.

The rule expressed in this instruction applies to anyone seeking benefits under an insurance policy. For example, one claiming to be a loss payee "as his interests may appear" on a property insurance policy must prove the right or interest he has in order to recover. *See Wilcox v. Mutual Fire Ins. Co. of Minnesota*, 81 Minn. 478, 481, 84 N.W. 334, 335 (1900). Similarly, one claiming to be a beneficiary under a life insurance policy has the burden of proving that status. *See Gwin v. Gappa*, 394 N.W.2d 530, 533 (Minn. Ct. App. 1986).

This rule also applies to actions under Minnesota's No-Fault Act. The supreme court has held that "[t]o be eligible for no-fault benefits [the insured] must also, of course, meet the use requirement established in *Klug* by proving that her injury resulted from an accident arising out of the use of a motor vehicle." *McIntosh v. State Farm Mut. Auto. Ins. Co.*, 488 N.W.2d 476, 480 (Minn. 1992). "[T]he party claiming no-fault benefits bears the burden of proving by a preponderance of the evidence that there was an accident and that the accident arose out of the operation, use or maintenance of a motor vehicle." *LaValley v. National Family Ins. Corp.*, 517 N.W.2d 602, 604 (Minn. Ct. App. 1994), rev. denied (Minn. Aug. 24, 1994). In *Alexis v. State Farm Mut. Auto. Ins. Co.*, 696 N.W.2d 109 (Minn. Ct. App. 2005), rev. denied (Minn. Aug. 16, 2005), the court of appeals held that an insured seeking no-fault benefits for her husband's death from carbon monoxide bore the burden of proving, by a preponderance of the evidence, that the injuries arose out of the use of a motor vehicle for transportation purposes.

CIVJIG 59.15

INSURANCE POLICY EXCLUSION BURDEN OF PROOF

Insurance policy exclusion—burden of proof

> [Name of insurer] claims that [name of insured] is not entitled to coverage under the insurance policy because [name of insured]'s [claim/loss/damage/injury/liability] is specifically excluded by the insurance policy. [Name of insurer] must prove by a preponderance of the evidence that [name of insured]'s [claim/loss/damage/injury/liability] is excluded by [quote claimed exclusion].

USE NOTE

This instruction is applicable to both first-party and third party insurance policy claims. For first-party claims, the instruction should be given using one of the following terms: claim, loss, damage, or injury. For third-party claims, the instruction should be given using either claim or liability. As noted below, the insurer bears the burden of proving an avoidance (such as the breach of a policy condition) or reduction in a recovery. In cases involving avoidance or reduction issues not found in an exclusion, this instruction should be modified accordingly.

AUTHORITIES

The leading Minnesota case deciding the burden of proof issue is *SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d 305 (Minn. 1995). In deciding what burden the insurer has, the court stated:

> In an action to determine insurance coverage, once the insured has established a prima facie case of coverage, it "is entitled to go to the jury * * * ." *Boedighimer*, 287 Minn. at 329, 178 N.W.2d at 614. If the policy contains an exclusion clause, the burden then shifts to the insurer to prove the applicability of the exclusion as an affirmative defense.

SCSC Corp., 536 N.W.2d at 313; *see also Travelers Indem. Co. v. Bloomington Steel & Supply Co.*, 718 N.W.2d 888, 894 (Minn. 2006); *Amos ex rel. Amos v. Campbell*, 593 N.W.2d 263, 266 (Minn. Ct. App. 1999).

In an earlier decision involving first-party coverage, the supreme court identified additional issues that an insurer must prove:

> It is well settled that, if the insurer seeks to avoid or reduce its li-

> ability, whether it be for nonfulfillment of an obligation or condition imposed on the insured or for the violation of an affirmative representation or condition subsequent, the burden is on the insurer to prove the facts to establish such avoidance or reduction.

Bolduc v. New York Fire Ins. Co., 244 Minn. 192, 197–98, 69 N.W.2d 660, 665 (1955); *see also Winthrop and Weinstine, P.A. v. Travelers Cas. and Sur. Co.*, 187 F.3d 871 (8th Cir. 1999).

Reliance Ins. Co. v. St. Paul Ins. Companies, 307 Minn. 338, 239 N.W.2d 922 (1976), involved the breach of a policy condition. The insurer argued the plaintiff's claim at issue was barred because it was not promptly notified of the claim as the policy required. The court agreed that late notice could be a defense to the claim, but only if the insurer could establish that it was prejudiced by the late notice. *Reliance Ins. Co.*, 307 Minn. at 341–42, 239 N.W.2d at 923–24. The insurer had the burden of proving prejudice.

Note, however, that there is a difference between "occurrence" liability policies, and "claims made" liability policies as to notice. Some "claims made" liability policies require that a claim be made and that notice be given during the policy period. *See N.K.K. by Knudson v. St. Paul Fire & Marine Ins. Co.*, 555 N.W.2d 21, 25 (Minn. Ct. App. 1996). Under such a "claims made" policy, the insured must prove the essential elements of coverage, including that notice was given during the policy period. *Esmailzadeh v. Johnson and Speakman*, 869 F.2d 422, 424 (8th Cir. 1989).

A contention that the insured committed arson is an example of an avoidance that must be proven by the insurer. *See Krueger v. State Farm Fire and Cas. Co.*, 510 N.W.2d 204, 211 (Minn. Ct. App. 1993). Therefore, the insurer has the burden of proving by a preponderance of evidence that the insured set the fire, *Schornak v. St. Paul Fire & Marine Ins. Co.*, 96 Minn. 299, 301, 104 N.W. 1087, 1088 (1905), and that the insured was intentionally responsible for its setting. *Barich v. Pennsylvania Fire Ins. Co.*, 191 Minn. 628, 630–31, 255 N.W. 80, 81 (1934).

Although most often a question of law as opposed to a question of fact for a jury, a liability insurer has the burden of proving it has no duty to defend its insured. "A duty to defend an insured on a claim arises when any part of the claim is " 'arguably' " within the scope of the policy's coverage, and an insurer who wishes to escape that duty has the burden of showing that all parts of the cause of action fall clearly outside the scope of coverage." *Jostens, Inc. v. Mission Ins. Co.*, 387 N.W.2d 161, 165–66 (Minn. 1986). And, "if the insurer is aware of facts indicating that there may be a claim, either from what is said directly or inferentially in the complaint, or if the insured tells the insurer of such facts, or if the insurer has some independent knowledge of such facts, then the insurer must either accept tender of the defense or further investigate the potential claim." *Garvis v. Employers Mut. Cas. Co.*, 497 N.W.2d 254, 258 (Minn. 1993). But, if an insured fails to meet its burden of presenting a covered claim through a complaint or extrinsic evidence, an insurer need not speculate about facts that may trigger its duty to defend, and may decline to defend the claim. *St. Paul Mercury Ins. Co. v. Dahlberg, Inc.*, 596 N.W.2d 674, 677 (Minn. Ct. App. 1999).

CIVJIG 59.20

EXCEPTION TO INSURANCE POLICY EXCLUSION BURDEN OF PROOF

Exception to policy exclusion—burden of proof

> [Name of insured] claims that [he/she/it] is covered under this exception to exclusion in the policy: [quote exclusion and exception or only exception as appropriate]. [Name of insured] must prove by a preponderance of the evidence that [his/her/its] [claim/loss/damage/injury/liability] is covered under this exception.

USE NOTE

This instruction is applicable to both first-party and third party insurance policy claims. For first-party claims, the instruction should be given using one of the following terms: claim, loss, damage, or injury. For third-party claims, the instruction should given using either claim or liability.

AUTHORITIES

The leading Minnesota case deciding the burden of proof issue is *SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d 305 (Minn. 1995). The court held that "once the insurer shows the application of an exclusion clause, the burden of proof shifts back to the insured because the exception to the exclusion 'restores' coverage for which the insured bears the burden of proof." *SCSC Corp.*, 536 N.W.2d at 314. *See also Smith v. State Farm Fire and Cas. Co.*, 656 N.W.2d 432, 436 (Min. Ct. App. 2003).

CIVJIG 59.25

MISREPRESENTATION—APPLICATION FOR INSURANCE

Part A

Misrepresentation

A misrepresentation by a person applying for insurance may be oral or written.

Misrepresentation in an application of insurance requires proof of all the following three elements.

False representation

1. (Applicant) falsely represented a past or present material fact to (insurer).

A fact is material if it would have substantially influenced the insurer's decision to issue the policy.

[The fact must be something that is knowable. This means that it must be possible to discover the fact.]

Knowledge

2. At the time the false representation was made, the insured must have
    - a. [Known the representation was false]
    - b. [Represented that (he) (she) knew about these facts when (he) (she) did not know if they were true or false.]

Intent

3. The false representation was made by (applicant) with intent to deceive (insurer).

Part B

Misrepresentation

A misrepresentation by a person applying for insurance may be oral or written.

Misrepresentation in an application of insurance requires proof of all the following three elements.

False representation

1. (Applicant) falsely represented a past or present fact to (insurer).

[The fact must be something that is knowable. This means that it must be possible to discover the fact.]

Knowledge

2. At the time the false representation was made, the insured must have

   a. Known the representation was false

   b. Represented that (he) (she) knew about these facts when (he) (she) did not know if they were true or false.

Materially increased risk

3. The false representation made by (applicant) materially increased the risk of loss to (insurer).

A false representation materially increases the risk of loss if it

   a. Creates a greater likelihood that (insurer) will have to pay claims than if the fact misrepresented by the (applicant) were true, or

   b. Substantially impaired (insurer's) ability to make a reasonable decision about whether to issue the policy.

USE NOTE

A misrepresentation by an insured will void a policy if it is made with the intent to deceive the insured or it increases the risk of loss to the insured. Part A instruction sets out the elements for establishing misrepresentation with the intent to deceive. Part B of this instruction sets out the elements for establishing misrepresentation that increases the risk of loss.

AUTHORITIES

M.S.A. § 60A.08, subd. 9, provides that:

> No oral or written misrepresentation made by the assured, or in the assured's behalf, in the negotiation of insurance, shall be deemed material, or defeat or avoid the policy, or prevent its attaching, unless made with intent to deceive and defraud, or unless the matter misrepresented increases the risk of loss.

In *Craigmile v. Sorenson*, 248 Minn. 286, 80 N.W.2d 45 (1956), the supreme court reiterated the standard interpretation of the statute:

> [A] material misrepresentation, made with intent to deceive and defraud, avoids the policy. A material misrepresentation, not made with intent to deceive or defraud, does not avoid the policy unless by the misrepresentation the risk of loss is increased. If a material misrepresentation increases the risk of loss, the policy is avoided, regardless of the intent with which it was made. An immaterial representation, though made with intent to deceive and defraud, does not avoid the policy.

Craigmile, 248 Minn. at 293–94, 80 N.W.2d at 50, *quoting Johnson v. National Life Ins. Co.*, 123 Minn. 453, 456, 144 N.W. 218, 219 (1913). *Also see In re Silicone Implant Ins. Coverage Litigation*, 652 N.W.2d 46, 77 (Minn. Ct. App. 2002), aff'd in part revd in part on other grounds, 667 N.W.2d 405 (Minn. 2003). The insurer has the burden of establishing the misrepresentation. *Craigmile v. Sorenson*, 248 Minn. 286, 295, 80 N.W.2d 45, 51 (1956). The misrepresented fact must be susceptible of knowledge to the person who relies and acts on it to his injury. *M.H. v. Caritas Family Servs.*, 488 N.W.2d 282, 289 (Minn. 1992); *Florenzano v. Olson*, 387 N.W.2d 168, 174 (Minn. 1986); *Swedeen v. Swedeen*, 270 Minn. 491, 495, 134 N.W.2d 871, 875 (Minn. 1965).

In *Howard v. Aid Ass'n for Lutherans*, 272 N.W.2d 910, 912 (Minn. 1978), the supreme court noted that Minnesota has adopted the majority view that materiality of a misrepresentation is measured "by the extent to which the disclosure influenced the insurer's decision to initially assure the risk or coverage, not by the degree of causal connection between the false statement and the loss protected by the policy." The court said that the "focal examination must be whether an omission or misrepresentation substantially affects or impairs an insurer's ability to make a reasonable decision to assume the risk of coverage." *Howard Aid Association for Lutherans*, 272 N.W.2d at 912–13. In *Security Mut. Cas. Co. v. Affiliated FM Ins. Co.*, 471 F.2d 238, 242 (8th Cir. 1972), the Eighth Circuit Court of Appeals, applying Minnesota law, approved the trial court's jury instructions in the case that the term " 'increases the risk of loss' means that there must be a greater likelihood of liability being imposed on the insurer than would have been the case if the facts were as the insured stated them to be."

An insured's misrepresentation of material facts will not affect the right of a loss payee under a loss payable clause in an automobile insurance policy. *Farmers State Bank of Russell v. Western Nat. Mut. Ins. Co.*, 454 N.W.2d 651, 653 (Minn. Ct. App. 1990).

CIVJIG 59.30

INSURANCE COVERAGE AND EXCLUSION—INTENTIONAL INJURY OR HARM

[No recommended Instruction]

USE NOTE

The intent to satisfy an intentional injury exclusionary clause in a liability insurance policy may be inferred as a matter or law, or it may be a factual issue to be resolved by the trier of fact. The Minnesota Supreme Court has stated that the standard for determining whether there is an accident, which triggers coverage, is for all practical purposes the same as the standard used to determine whether the intentional injury exclusion applies. The court has not taken a clear position as to which party has the burden of proof on the issue, nor does the Committee. There is no recommended instruction because of the potential variances in the policy language that may be applicable in a given case.

AUTHORITIES

The issue of whether a person's injury was an accident and the issue of whether an intentional act exclusion applies are in effect identical issues. *B.M.B. v. State Farm Fire and Cas. Co.*, 664 N.W.2d 817, 821 (Minn. 2003); *American Family Ins. Co. v. Walser*, 628 N.W.2d 605, 612 (Minn. 2001) (*quoting Tower Ins. Co., Inc. v. Judge*, 840 F. Supp. 679, 690 (D. Minn. 1993)). In *Tower*, the United States District Court noted that the issues were identical, but took no position on how the burden of proof should be allocated on the issue. *Tower*, 840 F. Supp. 690 n.6.

Liability insurance policies with intentional injury exclusions are intended "to exclude insurance coverage for wanton and malicious acts by an insured." *American Family Ins. Co. v. Walser*, 628 N.W.2d 605, 613 (Minn. 2001). The supreme court has stated that there is no substantial distinction in policy exclusions that excluded injuries that are "expected or intended" by the insured or injuries that are "caused intentionally." *Iowa Kemper Ins. Co. v. Stone*, 269 N.W.2d 885, 887 n.3 (Minn. 1978).

In cases where the policy language differs from the exclusions noted by the court, the instruction should be tailored to the specific policy language. If the policy language parallels the language noted in *Walser*, the following instruction can be used:

Intent to injure or harm

Intent to injure or harm means that (insured):

1. Wanted to cause injury or harm to (name of person), or
2. Knew that injury or harm was substantially certain to occur.

Exact harm need not be intended

It is not necessary that (name of person) intended the exact harm that occurred.

The intent to cause injury harm exists even if the actual injury or harm is more severe or of a different kind than the injury or harm intended.

The intent standard used in this instruction parallels the intent standard for use in intentional torts. *See* CIVJIG 60.10.

The intent necessary to exclude coverage is neither "the intent to act" nor is it "the intent to cause the specific injury complained of." It is instead the " 'intent to cause bodily injury' even if the actual injury is more severe or of a different nature than the injury intended." *Iowa Kemper Ins. Co. v. Stone*, 269 N.W.2d 885, 887 (Minn. 1978).

The issue of whether an injury was caused intentionally within the meaning of the exclusion depends on whether the insured had a specific intent to injure. If there is no actual intent, a court, in appropriate circumstances, may infer intent to injure as a matter of law. The supreme court has said that "[t]he general rule is that intent is inferred as a matter of law 'when the nature and circumstances of the insured's act [are] such that harm [is] substantially certain to result.' " *B.M.B. v. State Farm Fire and Cas. Co.*, 664 N.W.2d 817, 822 (Minn. 2003), *citing R.W. v. T.F.*, 528 N.W.2d 869, 872 (Minn. 1995). There is no bright line rule stating when intent may be inferred as a matter of law. The question has to be decided on a case-by-case basis. *American Family Ins. Co. v. Walser*, 628 N.W.2d 605, 613 (Minn. 2001). If intent to injure may not be inferred as a matter of law, the evidence may permit the trier of fact to infer that the insured did not intend by his or her conduct to cause injury. *B.M.B. v. State Farm Fire and Cas. Co.*, 664 N.W.2d 817, 822 (Minn. 2003).

The courts have inferred intent to harm in a variety of cases. *See Woida v. North Star Mut. Ins. Co.*, 306 N.W.2d 570 (Minn. 1981) (insured with rifle shot at truck when insured knew it was occupied); *Iowa Kemper Ins. Co. v. Stone*, 269 N.W.2d 885 (Minn. 1978) (insured wrapped his belt around his hand before hitting another person); *Continental Western Ins. Co. v. Toal*, 309 Minn. 169, 244 N.W.2d 121 (1976) (insureds planned robbery, knowing several participants would be armed; person was shot during the robbery). The supreme court has also inferred intent as a matter of law in cases involving nonconsensual contact. *E.g., State Farm Fire and Cas. Co. v. Williams*, 355 N.W.2d 421 (Minn. 1984) and for the negligent transmission of genital herpes. *R.W. v. T.F.*, 528 N.W.2d 869 (Minn. 1995).

An inference that the insured did not intend to cause injury may arise in cases where the insured's actions are reflexive or a sudden, impulsive defensive reaction. *B.M.B. v. State Farm Fire and Cas. Co.*, 664 N.W.2d 817, 822 (Minn. 2003); *State Farm Fire & Cas. Co. v. Wicka*, 474 N.W.2d 324, 330 (Minn. 1991); *American Family Mut. Ins. Co. v. Peterson*, 405 N.W.2d 418, 421 (Minn. 1987).

The supreme court has also taken the position that mental illness may affect the intent determination. *B.M.B. v. State Farm Fire and Cas. Co.*, 664 N.W.2d 817, 824 (Minn. 2003); *State Farm Fire & Cas. Co. v. Wicka*, 474 N.W.2d 324, 330 (Minn. 1991). The cognitive and volitional elements of intent may both be affected by mental illness. That issue may be a question of fact for the trier of fact. For guidance in formulating the necessary questions if mental illness is in issue in determining the applicability of an intentional injury exclusion, *see* 10 Minnesota Practice, Jury Instruction Guides—Criminal, CRIMJIG 6.02 (5th ed. 2006).

In *Travelers Indem. Co. v. Bloomington Steel & Supply Co.*, 718 N.W.2d 888, 897 (Minn. 2006), the supreme court relied on *Domtar, Inc. v. Niagara Fire Ins. Co.*, 563 N.W.2d 724 (Minn. 1997), as the proper definition of "expectation." The court in *Domtar* said that expected damage requires a certainty of harm on the part of the insured greater than general standards of foreseeability used to impose liability on the insured, and that "[i]n explaining the high degree of certainty demanded," it has "also equated 'expected' damage with 'reckless' conduct." *Domtar*, 563 N.W.2d at 735. The court also noted that the "standard does not preclude the use of circumstantial evidence or proof of willful blindness, but added that "it is the insured's actual expectation of damage that allows a defense to coverage." *Domtar*, 563 N.W.2d at 735.

RAM Mut. Ins. Co. v. Meyer, 768 N.W.2d 399 (Minn. Ct. App. 2009), arose out of injuries caused by RAM Mutual's insured, Meyer, during horseplay in a high school shop class. RAM Mutual, which had a homeowners' policy covering the Meyer family, brought a declaratory judgment action to establish that coverage was excluded because the injuries sustained by the other student were not an "occurrence" within the meaning of the policy and because the intentional act exclusion in the policy applied. The court of appeals held that the injury was the product of "regrettable horseplay" and that neither clause applied to preclude coverage.

The insurance policy defined an occurrence as "an accident which is neither expected nor intended." The term "accident" was not defined in the policy. Following the standard that there is no accident if there is an intent to injure, established by the supreme court in *Am. Family Ins. Co. v. Walser*, 628 N.W.2d 605, 612 (Minn.2001), the court of appeals concluded that lack of specific intent to injure the other student by Meyer mandated a finding that the injury was the product of an accident.

The insurer also argued that its intentional injury exclusionary clause precluded coverage. The clause provided that the policy "does not apply to liability which results directly or indirectly from . . . any act intended by an insured . . . whether or not the bodily injury or property damage was intended[.]" The court of appeals was reluctant to enforce the policy according to its rigid terms:

> We do not ignore the specific wording of appellant's exclusion. However, we note that appellant's interpretation of its exclusion would dramatically limit coverage and that by ignoring consequences, the policy redefines "intent" contrary to the standard jury instruction. See 4A Minnesota Practice, CIVJIG 60.10 (2006). As discussed below, appellant even requested a special-jury question that made intent to cause consequences a central consideration for the jury. This apparent inconsistency between appellant's position at trial and on appeal illustrates the difficulty appellant and the courts face with the application of the policy language. In sum, appellant's position creates uncertainty regarding the meaning of the word "intend." This uncertainty is a type of ambiguity that we resolve by reviewing the rest of the insurance policy and the reasonable expectations of the insured. Minnesota courts have a longstanding policy of interpreting insurance exclusions narrowly, *Travelers*, 718 N.W.2d at 894, and of construing contracts in a manner that avoids absurd and unjust results, *Mead v. Seaboard Sur. Co.*, 198 Minn. 476, 478, 270 N.W. 563, 565 (1936). It would be absurd to purchase a liability-insurance policy which excludes coverage for any injury derived from one's voluntary but nominally intentional conduct.

768 N.W.2d at 405–06.

The court of appeals rejected the insurer's open-ended interpretation of the policy exclusion because that interpretation would eliminate coverage for nominally intentional conduct. Instead, the court found it "more reasonable to read the exclusion as eliminating coverage for those occurrences in which the insured's act is so wrongful, willful and egregious or the anticipated injury is so obvious that the injury cannot be called 'accidental.' " The court used that definition of "intent" to avoid the impact of an exclusionary clause that would otherwise swallow the policy's insuring clause. *Id.* at 406.

CIVJIG 59.35

GOOD FAITH DUTY TO SETTLE

[No recommended instruction]

USE NOTE

Because of concerns about the exact contours of an insurer's good faith obligation to settle in Minnesota, the Committee does not recommend a specific instruction at this point for resolving the issue.

AUTHORITIES

In Minnesota, every contract includes an implied covenant of good faith and fair dealing, which requires that the parties do not unjustifiably hinder the other party's performance of the contract. *In re Hennepin County 1986 Recycling Bond Litigation*, 540 N.W.2d 494, 502 (Minn. 1995); *Zobel & Dahl Const. v. Crotty*, 356 N.W.2d 42, 45 (Minn. 1984).

In *Mendota Elec. Co. v. New York Indem. Co.*, 169 Minn. 377, 380, 211 N.W. 317, 318-19 (1926), the Minnesota Supreme Court held:

> [W]here the insured is clearly liable and the insurer refuses to make a settlement, thus protecting the insured from a possible judgment for damages in excess of the amount of the insurance, the refusal must be made in good faith and upon reasonable grounds for the belief that the amount required to effect a settlement is excessive.

Something more than a mere mistake must exist before an insurer will be deemed to have acted in bad faith, and thus be held liable in excess of policy limits. *Larson v. Anchor Cas. Co.*, 249 Minn. 339, 353–54, 82 N.W.2d 376, 384 (1957); *see also Peterson v. American Family Mut. Ins. Co.*, 280 Minn. 482, 486, 160 N.W.2d 541, 544 (1968) ("mere mistake in judgment does not, standing alone, constitute bad faith").

Minnesota has developed a two-prong test for analyzing bad faith claims. In *Boerger v. American General Ins. Co. of Minn.*, 257 Minn. 72, 100 N.W.2d 133 (1959), the court articulated the two grounds on which an insurer can, in good faith, refuse to enter a settlement:

> We are of the opinion that the insurance company could have validly declined the offer of settlement if good faith existed on either one of two grounds. First, if it in good faith believed that its insured was not liable. Second, even if liability of its insured was certain, if it believed in good faith that a settlement at the proposed figure which it was required to contribute was greater than the amount the jury would award as damages.

Boerger, 257 Minn. at 75, 100 N.W.2d at 135. This "test" however, has been anything but clear.

In *Short v. Dairyland Ins. Co.*, 334 N.W.2d 384 (Minn. 1983), the most frequently cited Minnesota case on the topic of bad faith in settlements, the Minnesota Supreme Court reformulated the first part of the good faith test. While not overruling *Boerger*, *Short* articulated a higher threshold for plaintiffs seeking to prove that an insurer acted in bad faith when refusing to settle. It expressed the test as follows:

> The insurer's duty of good faith is breached in situations in which the insured is clearly liable and the insurer refuses to settle within the policy limits and the decision not to settle within the policy limits is not made in good faith and is not based upon reasonable grounds to believe that the amount demanded is excessive.

Short, 334 N.W.2d at 388.

Boerger focused on whether the insurer believed the insured "was not liable," while *Short* requires that the person claiming bad faith prove that the insured "was clearly liable." The difference may be substantial, particularly where the facts on the liability issue are controverted. An insurer may lack an opinion one way or another as to whether the insured is liable, allowing a claimant to establish the first prong of the test as articulated in *Boerger*, yet the insured may not be "clearly liable," so that the claimant's evidence would fail the test as articulated in *Short*.

In *Larson v. Anchor Cas. Co.*, 249 Minn. 339, 350, 82 N.W.2d 376, 383 (1957), quoting *Frank B. Connet Lumber Co. v. New Amsterdam Cas. Co.*, 236 F.2d 117, 127 (8th Cir. 1956), the supreme court has stated the following rationale for the standard:

> It seems safe to say that it would be an unwholesome rule which would permit a liability insurer to be convicted of bad faith for having failed to compromise a personal injury action, justifiably believed by it to be without merit, if the plaintiff in the action should obtain a verdict and judgment against the insurer in excess of its policy liability. Such a rule would virtually have the effect of giving an insured under a limited liability policy unlimited coverage.

An insurer may be found liable only where both the "clearly liable" and the "good faith refusal to settle" parts of the *Short* test are met. *See Short*, 334 N.W.2d at 388–89 (holding breach occurred where both parts were satisfied); *Boerger*, 257 Minn. at 75–77, 100 N.W.2d at 135–37 (same); *Iowa Nat. Mut. Ins. Co. v. Auto-Owners Ins. Co.*, 371 N.W.2d 627, 629 (Minn. Ct. App. 1985) (no breach where insured was clearly liable, but insurer acted in good faith), rev. denied (Minn. Oct 18, 1985).

CIVJIG 59.40

INSURANCE AGENT AND BROKER DEFINED

Insurance agent

An insurance agent is an insurance professional who acts on behalf of a particular insurance company.

Insurance broker

An insurance broker is an insurance professional who acts on behalf of the prospective insured.

Deciding if an insurance professional is an agent or broker

Consider the following factors in determining whether (name of insurance professional or company) was acting as an insurance agent for (name of insurer) or an insurance broker for (name of insured), you are to consider the following factors:

1. At the time the insurance was obtained, whether (insurance professional) was employed by the insurance company or was acting independently of any employment with the insurance company?

2. Who gave (insurance professional) the original express or implied authority to do the act in question?

3. Whether the (insurance professional) was expressly authorized to do the act in question.

4. If the (insurance professional) was not expressly authorized to do the act in question, whether the act was a usual and necessary means for carrying out the insurance professional's authority.

5. Whether the act was done independently of the (insurance professional's) original employment, and if it was, for whom, or at whose request?

6. Which party the (insurance professional) could hold

directly responsible for (his) (her) (its) compensation at the time the act in question was done?

7. Whether the person who was dealing with (insurance professional) knew or should have known that there was any limitation on the insurance professional's apparent authority.
8. Whether there was any approval by (apparent principal) of the act claimed to have been authorized.

USE NOTE

This instruction should be used in its entirety when the status of the insurance professional is disputed. The first paragraph of this instruction can be given when there is no dispute that the insurance professional is the agent of the insurance company. The second paragraph can be given when there is no dispute that the insurance professional is a broker and therefore the agent of the insured. This instruction contemplates that additional instructions from CIVJIG 30.25 and 30.30 on Agency will also be given as to the particular agency issue in dispute.

AUTHORITIES

An insurance company is generally liable for the acts of its agents if they are acting in the scope of their employment, but before that rule can be applied it must first be determined whether the person claimed to be an agent was in fact acting in that capacity. *Eddy v. Republic Nat. Life Ins. Co.*, 290 N.W.2d 174, 176 (Minn. 1980). In *Eddy*, the court summarized the differences between an agent and broker:

> A person who procures insurance for others can be an insurance agent, an insurance broker, or both. The essence of the difference is that whereas an insurance agent acts on behalf of a particular insurance company, an insurance broker acts on behalf of the prospective insured. In which capacity a person is acting is a question of fact . . . . A broker is independently liable to the insured in either contract or tort for failing to procure insurance as instructed . . . but an agent's liability may be affected by the settlement of his principal.

Eddy, 290 N.W.2d at 176–77 (citations omitted).

In *Graff v. Robert M. Swendra Agency, Inc.*, 800 N.W.2d 112 (Minn. 2011), the supreme court considered a claim for negligent failure to procure insurance which Graff, the insured, brought against an insurance agency. Following a car accident, Graff learned that his policy did not provide the additional UIM coverage Graff believed he had purchased. The court ruled that an insurance agent may be held independently liable for the negligent failure to procure insurance coverage, noting that the recognition of this cause of action was "consistent with the well-established common-law rule that an agent is subject to liability for harm caused by the agent's negligence." *Graff* 800 N.W.2d at 117, n.4.

In *Morrison v. Swenson*, 274 Minn. 127, 136, 142 N.W.2d 640, 646 (1966), the Minnesota Supreme Court noted that "[u]nder certain circumstances and for certain purposes, an insurance broker may represent either the insured or the insurer, or both," and that the issue is a question of fact. *Morrison*, 274 Minn. at 132, 142 N.W.2d at 644. The court noted the difficulty in formulating any all-inclusive rule for purposes of determining whether one who takes an application for an insurance policy is an agent or broker, but offered a non-exclusive list to aid in making that determination:

> (1) Was the broker at the time of effecting the insurance actually or ostensibly connected with the insurer and employed by it, or was he acting independently of any employment by the company? (2) From whom did the broker's express or implied authority to do the act in question originally proceed? (3) Was the act one which the broker was expressly authorized to do, or was it a usual and necessary means to accomplish the execution of the authority conferred? (4) Was the act done independently of the original employment, and if so, for whom, or at whose instance? (5) Which party could the broker hold directly responsible for his remuneration at the time the act in question was done? (6) Was there any limitation on the broker's ostensible authority, of which the person dealing with him was, or ought to have been, cognizant? (7) Was there any ratification by the ostensible principal of the claimed authorized act?

See also Frank v. Winter, 528 N.W.2d 910, 914 (Minn. Ct. App. 1995), rev. denied (Minn. April 27, 1995).

SPECIAL VERDICT FORMS

CIVSVF 59.90

MISREPRESENTATION—APPLICATION FOR INSURANCE

1. Did (applicant) falsely represent (a) past or present material fact to (insurer)?

    ________ Yes or No

2. If your answer to Question 1 was "Yes," then answer this question: At the time the false representation(s) (was) (were) made, did (applicant) know the representation(s) (was) (were) false?

    ________ Yes or No

3. *If your answer to Question 2 was "No," then answer this question*: Did (applicant) represent that (he) (she) knew about (this) (these) fact(s) when (he) (she) did not know if (it) (they) (was) (were) true or false?

    ________ Yes or No

4. *If your answer to either Question 2 or 3 was "Yes," then answer this question*: Was this false representation made with intent to deceive (insurer)?

    ________ Yes or No

5. *No matter how you answered Question 4, and if your answer to either Question 2 or 3 was "Yes," then answer this question*: Did this false representation materially increase the risk of loss to (insurer)?

    ________ Yes or No

USE NOTE

This special verdict form is intended for use in cases where the issue is whether an applicant for insurance made a material representation to the insured with intent to deceive or where the misrepresentation materially increased the risk of loss to the insurer.

The special verdict questions and their supporting jury instructions are as follows:

1. CIVJIG 59.25: Misrepresentation—Application for Insurance
2. CIVJIG 59.25: Misrepresentation—Application for Insurance
3. CIVJIG 59.25: Misrepresentation—Application for Insurance
4. CIVJIG 59.25: Misrepresentation—Application for Insurance
5. CIVJIG 59.25: Misrepresentation—Application for Insurance